Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOHN PHILLIP SMITH, M.D.,

Petitioner,

vs.

WILLIAM B. RICKS, M.D., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(A Due Process Case)

Fair medical peer review is protected by the Health Care Quality Improvement Act of 1986 (HCQIA) 42 U.S.C. § 11111, *et seq.* This statute's standards for qualified immunity from antitrust suit if there is "fair," "reasonable," and "adequate" conduct of peer review proceedings have never been interpreted by the United State Supreme Court. This statute does not define these terms. Before HCQIA's enactment, such proceedings were governed by common-law standards of "fair procedure" and by industry guides based on published cases. The legislative history and § 11114 suggest that Congress intended to preserve these long-established common-law rights of fair procedure.

There is a conflict between the Ninth and Eleventh Circuits in the interpretation of this statute's procedural requirements for the qualified immunity it confers.

The case at bench is a physician's anti-trust suit. Summary judgment was granted by the District Court based entirely upon the anti-trust immunity of 42 U.S.C. § 11111, *et seq.* Obviously unfair peer review has been given HCQIA's *qualified* immunity. Petitioner contends that the peer review procedures followed in the case were not "fair," "reasonable," nor "adequate" within the meaning of the statute.

Petitioner documented below over a dozen breaches of rights long developed by common law, industry guidelines, and industry practices. The Ninth Circuit dismissed this common-law background as "irrelevant" to its determination whether respondents met the standards for fair peer review procedure established by this new statute, and sanctioned petitioner's counsel for raising this issue without affording him a hearing.

The following questions are presented:

1. What are the minimum standards of fair conduct in a medical peer review proceeding to earn qualified immunity under the HCQIA?

2. Does a reviewer's unfair conduct of a peer review proceeding support an inference of bad faith and disqualify the reviewer from statutory immunity?

3. Where respondent reviewers move for summary judgment "on the exclusive issue" of HCQIA immunity under the rebuttable presumption of 42 U.S.C. § 11112 (a), what standard is applied to the responding party's rebuttal evidence?

The Ninth and Eleventh Circuits are in conflict on this issue. *Bryan v. Holmes Regional Med. Center,* 33 F.3d 1318, 1333 (11th Cir. 1994) provides this test: "Might a reasonable jury ... conclude [plaintiff] has shown by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)" (quoting *Austin v. McNamara,* 979 F.2d 728, 734). In *Smith* at 1485 the "inquiry focuses on whether [plaintiff] has provided sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed their action was warranted by the facts."[1] *Smith* chops off the inquiry at the "reasonable belief" point, while *Bryan* includes the three additional statutory points presented by Congress in § 11112(a), sub. 2: "reasonable efforts to obtain the facts," § 11112(a), sub. 3: "adequate notice and hearing procedure," and § 11112(a), sub. 4 "reasonable belief" after a reasonable effort to obtain the facts and a proper hearing.[2]

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1. Appendix A at 13a.

2. Appendix at 57a.

4. Was the case "frivolous" within the meaning of 42 U.S.C. § 11113 where months after the entry of summary judgment on the statutory immunity issue, the district court, without requesting briefing by the parties, *sua sponte* required "direct evidence" of a conspiracy as fundamental to establish petitioner's Sherman Act case, made a finding that petitioner's case was "frivolous" because he had not presented such evidence, and based its § 11113 fee shifting order of over $300,000 on said finding?

5. Did the District Court's *in camera* assessment of the legal fee application based on "attorney re-cap" instead of original records (which original records were available and subpoenaed by Dr. Smith) violate Federal Rules of Evidence, Rule 1006?

6. Were the requirements of Federal Rules of Appellate Procedure, Rule 38 and due process satisfied by assessing a $137,500 sanction against petitioner's attorney without notice and a hearing for arguing that the court in interpreting the new statute's requirement for "fair," "adequate" and "reasonable" procedure in peer review hearings and private administrative appeals (which terms are undefined by the statute) consider "fair procedure" guidelines such as those issued by committees of the American Bar Association, the American Hospital Association and other similar organizations experienced in physician peer review, published case law, and state legislation? Should there be neutral review of big sanctions?

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OPINIONS BELOW

Opinions and Orders below are appended along with a catalog of Unfair Acts and significant text of HCQIA. The Appendix and its contents are as follows: Appendix A — *Smith v. Ricks*, 31 F.3d 1478 (9th Cir. 1994); Appendix B — Ninth Circuit Order (unpublished) of October 4, 1994, (Request for Ninth Circuit General Order 10.9 sanction procedure denied); Appendix C — Ninth Circuit Order (unpublished) of November 17, 1994 (rejecting petition for rehearing of request for General Order 10.9 proceedings); Appendix D — *Smith v. Ricks*, 798 F. Supp. 605 (N.D. Cal. July 15, 1992) (Summary Judgment granted); Appendix E — District Court Order (unpublished) of October 6, 1992, (Fee Shift pursuant to § 11113 for "frivolous" case); Appendix F — Unfair Peer Review Acts, a catalog with E.R. references; G — Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111, *et seq.* (significant portions); H — Separate Appendix, Weissberg and Aronson's newsletter.

STATEMENT OF JURISDICTION

An order denying rehearing of the Ninth Circuit Court of Appeals opinion was signed October 4, 1994 and filed October 5, 1994. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(i).

STATUTES INVOLVED

Significant portions of 42 U.S.C. § 11111, *et seq.* appear in Appendix G at 57a-61a.

STATEMENT OF THE CASE

A. Physician's Antitrust Suit

This is a physician's anti-trust suit against his competitors and others who control the hospital peer review process and

misused it (in a long list of hostile acts cataloged in Appendix F) to expel him from the medical staff of Good Samaritan Hospital (GSH) in San Jose, California. Dr. Smith's suit claims peer review was abused for anti-competitive purposes. Also sued are trustees — ten out of 15 of whom refused to step aside despite a recorded *voir dire* in which they admitted business or professional connections to the accusers. These trustees voted to set aside the decision of a "jury" (Judicial Review Committee [JRC]) of doctors on the medical staff who heard all the evidence and decided to keep Dr. Smith on the medical staff.

B. Rule 56 Motion — Sole Issue: HCQIA Immunity

Respondents moved for summary judgment, contending that they were immune from suit based upon 42 U.S.C. § 11112. In opposition to this motion Dr. Smith provided evidence of a dozen wrongful acts by respondents[3] compared to industry practices.

Summary judgment was granted early in the case on the narrow issue of qualified HCQIA immunity only (798 F. Supp. 506, Appendix D). Discovery was incomplete at the time judgment was entered. The magistrate's order for document production by respondents had not been complied with, and no depositions had been taken.

C. The Post-Judgment Fee Shift Under 42 U.S.C. § 11113

Two months after the summary judgment was appealed, respondents moved for a shift of attorney fees under 42 U.S.C. § 11113. Although the Sherman Act anti-trust issues had not been addressed by any of respondents' motions, the district court *sua sponte* ruled the case was frivolous for failure to produce "direct evidence" of conspiracy, and shifted the respondents' legal fees

3. *Compare Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658 (1988) at note 3 condemning conduct which was "shabby, unprincipled, and unprofessional."

and costs onto petitioner. (*See* unpublished fee shifting order, Appendix E at 47a.) The district court did not request briefing on the issue of need for "direct evidence."[4]

D. The Sanction on Appeal

Dr. Smith's attorney was publicly castigated for the appeal:

> But if anyone is truly at fault in pursuing this *meritless claim*, it is Dr. Smith's counsel, Jerome Berg. He should have known his *legal arguments were clearly frivolous*. Instead of recognizing his misconduct when the district court imposed sanctions, Mr. Berg pressed on. *Mr. Berg argued this court should apply various state law decisions and professional guidelines in place of the text of the HCQIA*. [Emphasis added, *Smith v. Ricks*, 31 F.3d at page 1489.]

The sanction should be vacated on both due process and substantive grounds. First, that criticism was not preceded by any notice except respondent's non-specific request for fees on appeal. Second, Dr. Smith's lawyer did not argue that the court should ignore the text of HCQIA. Rather, Dr. Smith contended that its undefined terms "fair," "reasonable" and "adequate" should be interpreted in light of previous common law, industry practices, and professional guidelines especially since the Secretary of HHS declined the invitation of Congress to write guidelines (§ 11114, Appendix G at 61a). The legislative history and § 11114 show that Congress was aware of this common law background and recognized that HCQIA'S procedures were

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4. *See* Sherman Act analysis in *Bolt v. Halifax Hosp., etc,*. 891 F.2d 810, 819 (11th Cir.1990); *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1033 (9th Cir. 1989), *aff'd*, 500 U.S. 322, 111 S. Ct. 1842 (1991); and *Islami v. Covenant Med. Center*, 822 F. Supp. 1361 (N.D. Iowa 1992).

incomplete. Third, imposition of this sanction violated due process and the Ninth Circuit's General Order No. 10.9 requiring notice and an opportunity to respond.

E. *Smith's* Impact

The largest West Coast law firm defending suits of this type is Weissburg & Aronson. Their August 23, 1994 newsletter analyzes *Smith* in a box on the front page:[5]

> **Impact:** The decision is important for peer reviewers, because it upholds HCQIA's immunities against a series of *alleged procedural defects that are commonly raised by physicians* in state court peer review lawsuits, but which have not been ruled on by any federal appellate court interpreting HCQIA. The attorneys' fee award may also deter similar frivolous suits in the future. [Emphasis added.]

The only HCQIA case in which such a fee shift was previously ordered is the unpublished case of *Wei v. Bodner,* 92 WL 165860 (referred to by the district court) (Appendix E at 46a) where plaintiff made no effort to contest the § 11112 claim to immunity. By contrast, Dr. Smith has shown respondents engaged in a long series of unfair peer review acts which are at odds with the customary fair procedure practices of the industry.

F. Only *Smith* Addresses Mechanics of Fair Procedure

Smith is still the only action under HCQIA which addresses in detail the procedural mechanics of what shall be the acceptable standard of "reasonable efforts to obtain the facts" and what are "adequate" hearing and appeal procedures in the private

5. This newsletter is separately appended as Appendix H.

administrative process at the 7,000 hospitals in America. For this reason, even if Dr. Smith must lose, it was not frivolous to initiate and pursue this case.

G. Statement of Facts

(i) Thumbnail History; Competitors Attack Dr. Smith's Practice

Dr. Smith is a young, very capable, hard-working internist and cardiologist. He began his practice in San Jose, California at O'Connor Hospital but he left after anti-competitive doctors refused to renew his practice rights. They faulted him on four very complex internal medicine cases and reported him to the state medical board in an effort to cripple his career.

Dr. Smith moved his practice to GSH in the early 1980's. He was building a big internal medicine and cardiology practice in his six years on the GSH medical staff (probably the single busiest doctor) when senior competitors who controlled the medical staff membership mechanism began to harass him through challenges before the departmental committees they control. (One way they control peer review is by not sharing review duties with all members of the department.)[6] Dr. Smith refuted most of the charges at committee level, and he was "re-appointed" to the staff April 18, 1988 although all of the prior GSH accusations and adverse evaluations of his old O'Connor Hospital cases were known. (This fact is acknowledged in the opinion, Appendix A at 6a.)[7]

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6. Appendix F at 50a, item 1(a).

7. The opinion unfairly relied on criticisms of the stale O'Connor cases by doctors whose *curricula vitae* were never provided, but whose criticisms were not respected enough by the Medical Board of California (formerly Board of Medical Quality Assurance) to warrant a licensing citation. The medical staff reappointment of Dr. Smith by his competitors should be adequate proof that those critics got no respect at GSH either. Those criticisms were not presented at the JRC or the appeal to the Trustees.

At a heart catheterization (about his 500th without a death) patient L.W. died on April 8, 1988.[8] A nurse eyewitness made a contemporaneous standard "notification form" report of the death, but a week or so later, after discussions with respondent Dr. Nagel, she made a new report. Shortly thereafter, formal charges were initiated based on the old accusations and the new death report of this nurse. *The nurse's original death report has been suppressed to this day!* Respondents withheld it from all the pre-hearing review committees frustrating a "reasonable effort to obtain all the facts" (§ 11112(a)(2)). Respondents admitted possessing this report, but claimed it is protected by the litigation privilege. Also suppressed in the review process was a "no negligence" peer review letter about the L.W. death from a cardiologist at Baylor University.

A hearing was held before a panel of doctors (a Judicial Review Committee, or "JRC") at which Dr. Nagel's cousin (respondent Keith Bartel, Esq.) was the legal advisor provided to the JRC by respondents. Mr. Bartel participated in the JRC's deliberations, instructed them in the law, ruled on admissibility of evidence at the hearing, prevented *voir dire* of business connections between the JRC and the accusers, and drafted the decision. (*See* 798 F. Supp. 608, Claim No. 6, Appendix A at 34a.)

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8. This death occurred 10 days *before* the re-appointment, and a jury could believe it also was known because defendant Dr. Nagel runs the cath lab where it occurred, and he was present at the time of death. The JRC found, "of the hundreds of cardiac catheterization cases performed by Dr. Smith at [GSH this] was the only catheterization case in which Dr. Smith's judgment, management and technique were criticized and proved." *Compare* the unsupported contrary finding by defendants noted by the district court at 798 F. Supp. 607, Appendix A, page 30a. The only JRC evidence against Dr. Smith came from his competitors. No independent outside review was made, and two items of evidence in the L.W. death case were suppressed: the original incident report by the nurse eyewitness and an evaluation solicited by Dr. Smith from Dr. Fletcher. (*See* Appendix F, page 51a, items C and E, page 51a, item C, and page 54a, item E.)

Mr. Bartel specifically ruled that the eyewitness nurse's first report was not admissible evidence at the JRC hearing.

After the JRC decided to retain Dr. Smith on the staff respondent competitors appealed to the hospital's trustees who expelled Dr. Smith. (798 F. Supp. 608)

Dr. Smith took his practice to nearby Mission Oaks Hospital where he soon had more cases than any other doctor (by far) and no complaints about his patient care. The business organization respondents bought Mission Oaks Hospital, and they consolidated the medical staffs. As the competitor-dominated GSH medical staff organizations from which Dr. Smith had been recently expelled now controlled Mission Oaks Hospital as well, Dr. Smith moved his practice to another hospital, but like Mission Oaks, it has no heart catheterization facility.

(ii) Opposition to the Summary Judgment Motion (Defects in the Peer Review, JRC Hearing, and Appeal to the Trustees)

Respondents moved for summary judgment on the declaration of a hospital secretary that peer review was done together with the hospital administrative record.

In opposition to the summary judgment motion Dr. Smith produced the declaration of Jerome Lackner, M.D., former Secretary of the California Department of Health. The Lackner declaration provides the standard for good faith peer review and explains its importance to the goal of continuous improvement of "quality health care" (a central concept of HCQIA, *see* § 11112(a)) Dr. Lackner states that failure to produce data in which the doctors are ranked on a performance basis suggests that if the information were produced it would prove Dr. Smith was being treated unfairly. (E.R. 264). The magistrate judge made a discovery order for that type of information, but none of it has

ever been produced. Dr. Smith also presented declarations of Jerome Berg, Esq., an eyewitness to the process as well as an expert in physician staff rights cases which demonstrate numerous violations from "quality health care" and due process standard practices of the industry. Peer review guides produced by health industry professionals in the American Bar Association, the American Hospital Association, and other similar organizations were introduced through a Berg declaration. (*See* 31 F.3d at 1487 footnote 8, Appendix A at 16a finding these guidelines "irrelevant.")[9] But that ruling overlooked the intention of Congress to augment the fair procedure elements of HCQIA through subsequent administrative guidelines after consultation with the industry. (*See* § 11114 at Appendix A at 61a.)

Also submitted in opposition to the summary judgment motion Dr. Smith provided the JRC testimony of America's leading academic cardiologist, the late Melvin Marcus, M.D. Dr. Marcus found no negligence in the L.W. catheterization lab death, and he criticized a host of untoward cath lab results of respondents (which corroborates the inference that respondents practice a double standard and unfairly attacked Dr. Smith). Also, Dr. Smith provided an evaluation of the L.W. death ("no negligence") by a Baylor University cardiologist, Dr. Fletcher (which surfaced in the discovery process of this case after Dr. Smith filed suit). The Fletcher report had been suppressed during the review and JRC by respondents and their lawyers.

Respondents submitted no percipient witness declaration of facts; no expert declaration justifying their obviously unfair review, hearing, and appeal; and no expert declarations which criticize Dr. Smith's patient care.

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9. Appendix F is a catalog of the unfair acts practices in violation of those guidelines during the peer review which Dr. Smith submitted to rebut respondents' summary judgment claim to the HCQIA presumption of fair procedure.

(iii) Use of Expert Witness Declarations to Exhibit Industry Practices Was Appropriate Advocacy

Before *Smith, Austin v. McNamara* (979 F.2d 728 (9th Cir. 1992)) and *Islami* (*supra*) were the only judicial opinions regarding the adequate procedure standards of HCQIA. *Smith* now presents a very detailed well-documented history of numerous due process violations compared to hearing protocols of an American Bar Association Committee of health industry lawyers, the Peer Review Immunity Task Group of the American Academy of Hospital Attorneys of the American Hospital Association,[10] the California Medical Association, and California Business and Professions Code § 809, as well as case law in the hospital staff membership field.

REASONS FOR GRANTING THE WRIT

I. TERMS OF HCQIA IMMUNITY

A. Issues Presented by In-Hospital "Peer Review"

Private in-hospital "peer review" requires a balancing of interests. The public has an interest in the quality of medical services. However, "peer review" of a physician's performance, in which his professional livelihood is at stake, is normally conducted by other physicians in practice at the same hospital — *i.e.*, by the accused physician's competitors who can abuse peer review to hide their own malpractices while expelling competitors without objective outside review. Prior to the passage of the HCQIA, the courts fashioned rules of "fair procedure" for in-hospital proceedings to balance these interests.

The threshold issue is whether respondents met the minimum standards of fair conduct. Petitioner proved a baker's

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10. Parts of which are quoted in footnote 14 below.

dozen violations of fair proceedings (Appendix F). Over his objections, respondent peer reviewers refused to follow fair practices.

B. The Immunity Standards of HCQIA

HCQIA's immunity standards are set forth in §11112 (Appendix G). 42 § 11112(a)) provides general standards. Immunity from anti-trust litigation is conferred if those who acted:

1. Held reasonable belief the action was in the furtherance of quality health care,

2. Made a reasonable effort to obtain the facts,

3. Provided adequate notice and hearing procedures or others as are fair to the physician, and

4. Possessed a reasonable belief the action was warranted by the facts known after (2) and (3).

Section 11112(a) concludes with a rebuttable presumption that these standards were met "unless the presumption is rebutted by a preponderance of the evidence."[11] This burden is no more than the petitioner's burden of proof in all civil cases.

The U.S. House of Representatives Committee on Energy and Commerce, which wrote HCQIA, expressed its measure for assessing the bona fides of the review. The committee's report appears to require a neutral and generous physician-sparing review, not a mean-spirited anti-competitive prosecution:

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11. HCQIA's "preponderance of the evidence" burden on plaintiff is not as heavy as an earlier draft which required "clear and convincing" evidence to overcome the presumption of compliance with the four standards (*see* H.R. Rep. No. 903, 99th Cong. 2d Sess. 3 (1986) at page 10).

> • "In any case, it is the Committee's intent that physicians receive fair and unbiased review to protect their reputations and medical practices." (House Report P.L. 99 - 660, page 6393).
>
> • "... even a legitimate malpractice claim does not automatically mean that a practitioner deserves disciplinary action. Any practitioner — even the most skilled and careful — can make an occasional mistake." (*Op. cit.* 6396, mid-page).

During the 1986 debate Representative Waxman expressed Congress' desire to grant immunity to fair peer review but not to monopolistic abuse in these words addressed to the Ninth Circuit Court of Appeals ruling in *Patrick v. Burget,* 800 F.2d 1498 (1986):[12] "Bad faith peer review activities permitted by the *Patrick* case could never obtain immunity under [HCQIA]." (Congressional Record October 17,1986, daily edition H11590 at the foot of the first column).

Another guide to interpretation of HCQIA's § 11112(a) "reasonable effort to obtain the facts" and "reasonable belief the action was in furtherance of quality health care" based on those efforts is the *American College of Physicians Ethics Manual* ,117 *Annals of Internal Medicine* 947 at 956 (1992):

> [I]n the absence of substantial evidence of professional misconduct, negligence, or incompetence, it is unethical to use the peer review process to exclude another physician from practice, to restrict clinical privileges, or to otherwise harm the physician's practice.

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12. *Reversed,* 486 U.S. 94,108 S. Ct. 1658 (1988).

C. The Presumption of an Adequate Hearing. Did Respondents Do Enough to Qualify?

The second procedure section of HCQIA (§ 11112(b)[13] addresses the hearing process and supplies an unrebuttable presumption that the hearing is adequate if certain provisions are met. Those provisions in condensed form (not an exact quote) as to the relevant issues §11112(b)(3) provide:

> [T]he . . . entity is deemed to have met the adequate notice and hearing requirement if, as to the hearing, the entity appoints a hearing officer not in direct competition with the physician or a panel of individuals not in direct competition. The physician has the right to be represented by an attorney, have a record made of the proceedings, call, examine and cross-examine witnesses, and present evidence.

The appellate opinion claims that respondents conducted the JRC hearing by a method "so close" to the § 11112(b)(3) "conduct of hearing" list that "no reasonable jury could find Dr. Smith rebutted the presumption that the procedures were adequate." 31 F.3d at 1487 (Appendix A at 16a).

Dr. Smith disagrees, and contends the evidence establishes that respondents did not do all that is necessary entitle them to § 11112(b)'s irrebuttable presumption of an adequate hearing.

The cousin of one respondent was appointed as law officer of the hearing committee. He made rulings suppressing a written eyewitness account of the main case against Dr. Smith and refused to make a record of his guidance of the committee. Neither the Court of Appeals' opinion 31 F.3d 1486 (Appendix A at 15a-16a) nor the district court's opinion 798 Fed. Supp. 605

13. Appendix G at 59a-60a.

address these two points, nor most of the other unfair acts which appear in the record (Appendix F). Here is Dr. Smith's specific list of defects in the JRC hearing process which prevent a finding that § 11112(b) can be "deemed" to have been satisfied:

1. Dr. Smith contends that "representation" by a lawyer cannot occur if the lawyer is not allowed to speak and act as lawyers customarily do when "representing" a client.[14] (*See* Appendix F at 53a and 55a for a review of the JRC defects in which a speaking lawyer would have been helpful in making a

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14. The opinion's reference at footnote 8 to the mute attorney in *Anton v. San Antonio Hospital,* 19 Cal. 3d 802, 827, 140 Cal. Rptr. 442, 456 (1977) is distinguishable. *Anton* interpreted a pre-HCQIA contract (the bylaws under which the hearing was conducted) which did not contain HCQIA's explicit "right to be represented by a lawyer." (*See* 19 Cal. 3d 828, 140 Cal.Rptr. 456-7). Justice Clark, in dissent, points out that "the majority, in effect, forces the physician to practice law." (19 Cal. 3d 834, 140 Cal. Rptr. 461). The Peer Review Immunity Task Group of the American Academy of Hospital Attorneys of the American Hospital Association guideline (E.R. 381) recommends these procedures to satisfy HCQIA (emphasis added):

> 1. *Right to an attorney's services*
>
> "*The attorney advising the hearing panel and the attorney representing the physician should be accorded reasonable latitude in cross-examination, but acrimony should not be allowed by the hearing panel.*"
>
> 2. *Permitting useful evidence*
>
> "*Substantial latitude should be permitted in the presentation of evidence, medical reference works and testimony,*" within reasonable time constraints and the discretion of the hearing panel.
>
> 3. *Testimony of a competitor*
>
> Physicians who are direct economic competitors of the physician involved may testify as witnesses, whether they are called by the physician or the hearing panel or the hospital, but "*a physician should not be deprived of his privileges solely on the basis of medical testimony by economic competitors.*"

clear record about *voir dire*, suppression of evidence, and more.)

2. Dr. Smith contends a "record" means a full record including all the "jury" instructions told to the hearing and appeals panels (such as how to assess witnesses, burden of proof, the consequence of suppressing evidence, false statements, weighing expert testimony by a competitor, inferences to be drawn from refusal to have an outside evaluation, the legal and procedural consequences of their decision, the legal effect of the language Mr. Bartel wrote for their decision, and the like). In connection with the stale O'Connor Hospital cases (which occurred more than six years before) did Mr. Bartel inform the physician jury that in *Wyatt v. Tahoe Forest Hospital Dist.*, 174 Cal. App. 2d 709, 714, 345 Pac. 2d 93, 96 (1989) the court held that a physician should not be denied practice rights for remote past conduct? The full record issue is also important under the facts of the streptokinase case because that case turns on a difference of opinion between the accusers and Dr. Smith, but Dr. Smith produced medical literature which supports his treatment while the accusers did not. In this connection *see Rosenblit v. Superior Court,* 131 Cal. App. 1434, 1447, 282 Cal. Rptr. 819, 827 (1991) which holds that the public has a right to a "variety of treatment options" and "diversity of opinion" of physicians. How did Mr. Bartel advise the JRC? There is no record.

3. Dr. Smith contends the § 11112(b) "right to call witnesses" and "present evidence" includes the right to evidence such as the nurse eyewitness's suppressed original report as well as the report she made a week or so later after Dr. Nagel counseled her, and Dr. Fletcher's report which the accusers' attorney, Mr. Campbell, had in his possession throughout the JRC but did not release. This right should also include some right of discovery as suggested by the industry guides and California Business and Professions Code § 809

especially of exculpating evidence held by the accuser. (*See* Calif. Bus. and Prof. Code § 809.2(d) and (e)(l) and (2).)

Dr. Smith contends that failure to satisfy these three elements drops the anchor outside § 11112(b)'s "safe harbor," and "so close" is not adequate to obtain the presumption of an adequate hearing.

If the opinion had listed all of Dr. Smith's criticisms of the process imposed on him the court below would have made it clear that it was approving as a matter of law procedures which do not produce a fair hearing. By omitting many obviously off-putting practices of the respondents the opinion projects a very difference case than the one Dr. Smith presented.

D. Absent Satisfaction of the Statutory Presumption of an Adequate Hearing Respondents, Can Be Attacked on a Wider Field of Due Process Violation Than § 11112(b) Provides.

If respondents' hearing process is not found to have docked in the "safe harbor" unrebuttable presumption of § 11112(a)(3) but was merely "so close," as the court found, the in-the-hospital procedures must meet the minimum test of § 11112(a)(3): "adequate procedure."[15]

Dr. Smith has demonstrated respondents missed the boat on fair practices in this case by listing all the obviously unfair things they did in Appendix F. A jury could easily find respondents failed to accord Dr. Smith "adequate procedure."

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15. For the sake of a minimal rights discussion assume that "adequate procedure" is written in the statute as an alternative to "or such procedures as are fair . . . ." This concession for purposes of the argument foregoes the reasonable interpretation that the statute's subordinate clause explains "adequate procedure." (*See* Appendix G at 57a).

E. Did Respondents Demonstrate the Other Mandatory Elements for § 11112(a) Immunity—Reasonable Belief That Their Action Furthered Quality Health Care and a Reasonable Effort to Obtain the Facts?

(i) Conflict of Circuits

Whether or not the hearing process arrived in the "safe harbor" of adequacy or was outside, but "so close," two other mandatory elements of the immunity expressed in § 11112(a) need to be examined, "reasonable belief the action was in the furtherance of quality health care" and "reasonable efforts to obtain the facts." The listed deficiencies (Appendix F) demonstrate that Dr. Smith provided a fact showing sufficient to rebut the rebuttable presumption of § 11112(a) that respondents did not make adequate efforts to get all the facts, and they could not have held a reasonable belief that what they did was in furtherance of quality health care. Here the Court of Appeals (at 1458, Appendix A at 13a) skipped most of the § 11112(a) conditions and only focused on "reasonable belief their action was warranted by the facts."[16] The Court of Appeals ignored the HCQIA's immunity requirements to make "reasonable efforts to obtain the facts" and to provide "adequate notice and hearing procedures." This oversight by the court places *Smith* in conflict with the Eleventh Circuit and other Ninth Circuit cases.The fundamental HCQIA issues raised by Dr. Smith were (1) that he had an unfair review made without a "reasonable effort to obtain the facts." He complains of suppressed reports, failure to engage the customary outside (objective) review relying instead on criticisms of his competitors, and (2) the hearing and appeal processes were not adequate, they were "a kangaroo court" (quoting the district court at 798 F. Supp. 611 at the foot of

16. Even here a jury could find that if defendants believed they had a good case against Dr. Smith they would not have needed all the unfair tricks they played.

column II). He concludes that these defects deprive respondents of HCQIA's qualified immunity.

II. DOES A MOTION FOR SUMMARY JUDGMENT UNDER § 11112(a) REQUIRE THE COURT TO WEIGH EVIDENCE ON ALL FOUR ELEMENTS FOR IMMUNITY?

The general rule on a motion for summary judgment is that the non-moving party is entitled to the benefit of all reasonable inferences his evidence supports. The court should not further weigh the evidence once the non-moving party has displayed specific facts which exceed a minimum adequate to support a jury verdict. (*See Matsushita, etc v. Zenith, etc.,* 475 U.S. 574, 587, and *Anderson v. Liberty Lobby,* 472 U.S. 242, 249-250 (1986).)

The Court of Appeals departed from this traditional Rule 56(e) analysis. Instead, the court united two elements from *Austin*: "the rebuttable presumption *creates a somewhat unusual standard of review*" (which refers to all the § 11112(a) provisions) with a more limiting subordinate quote from another part of *Austin* focused on only one element of § 11112(a). By not discussing the other three fair procedure statutory elements required for the immunity the court concludes, "Dr. Smith could not rebut that [§ 11112(a)] presumption." (Appendix A at 13a). Although Dr. Smith presented specific evidence that respondents did not conform to the standards of § 11112(a), the Court of Appeals without explanation did not list and evaluate this evidence. Instead, the court writes, "Dr. Smith raises a number of 'procedural defects,' but we reject his claims." (*See* 31 F.3d at 1478, Appendix A at 15a where only four defects are listed.) "Dr. Smith raised *numerous* other alleged defects" (at 1487, Appendix A at 16a, emphasis added), but none of the other defects (Appendix F) are listed in the opinion — not even the suppressed eyewitness report.

By departing from traditional Rule 56 analysis the Court of Appeals produced a result "demonstrably at odds with the intentions of [HCQIA's] drafters." *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 571, 102 S. Ct. 3245, 3250 (1982). HCQIA's descriptive caption "Chapter 117 Encouraging Good Faith Professional Review Activities" is not advanced when mean-spirited review and unfair procedures are approved by the court.

Dr. Smith contends that HCQIA § 11112(a)(3) requires analysis of two elements of the peer review: the hearing and appeal process and the investigative "quality of care" process. First, has the non-moving party produced evidence which could sustain a verdict that the hearing procedures were inadequate or unfair? *Austin* (*supra*) stands as an example of a hearing which was indisputably fair.

Here is a tabular comparison between the process given to Dr. Austin and the one given to Dr. Smith:

Provisions	Austin (731 F. Supp. 934)	Smith (*See* Appendix F)
Outside review	California Medical Association appointed outside doctors Tolchin and Shertz (936)	Refused
Hearing officer	Retired Appellate Justice Hon. William Reppy (937)	Accuser Nagel's cousin
Representation	By counsel (937 and 941)	Counsel muted
Record	"all the proceedings were recorded by court reporters" (941)	Instructions to hearing panels were not recorded

Provisions	Austin (731 F. Supp. 934)	Smith (*See* Appendix F)
Evidence	"all the evidence he desired" (941)	Suppressed nurse eyewitness' first report, and Dr. Fletcher's favorable review of the L.W. death case

Austin's summary judgment is appropriate. The district court reports that Dr. *Austin* "does not attempt to refute or contest any of respondents' efforts to apply the immunity elements of HCQIA to the facts of this case" (942).[17] By contrast, Dr. Smith's Rule 56(e) specific evidence of due process violations are swept under the rug by the August 11,1994 opinion.

Fobbs v. Holy Cross (St. Agnes Hospital), 789 Fed. Supp. 1054 (C.D. Cal. 1992) shows a pattern of fair procedure similar to the *Austin* procedure. A JRC hearing was held where *voir dire* was not allowed. After petitioner complained, the case was returned for a new JRC with *voir dire*. The *Fobbs* court held that "plaintiff had wrongly been denied the right to conduct *voir dire* of the JRC. . . ." Dr. Smith complains that his truncated *voir dire* of the JRC glossed over at 1483 (Appendix A at 8a) forbade learning about business and professional connections the accusers and the JRC. We later learned a JRC member is a patient of one respondent accuser. *Smith* asserts at 1486 (Appendix A at 16a) that HCQIA "does not require *voir dire*." Dr. Smith contends a biased "jury" defies HCQIA's fairness and reasonableness requirements. Respondent Nagel's cousin, Mr. Bartel, appointed and paid by respondents, prevented a proper *voir dire* and committed other unfair acts while acting as the legal

17. Austin did not complain about two biased tribunals, suppressed evidence, a muzzled lawyer, an upside-down burden of proof-or lack of a record — all serious deficiencies in Dr. Smith's JRC (Appendix F).

advisor to the JRC. On appeal to the Board of Directors there is a lengthy *voir dire*. (*See* Appendix F at 56a, item a.) Ten of the 15 directors who voted to reverse the JRC were connected to the accusers by business or professional ties, but they refused to step aside.

The second level of analysis focuses on the § 11112(a) issues of reasonable belief and reasonable efforts to gather the facts. Dr. Smith is entitled to the inference expressed in *Harris v. Bellin Memorial Hospital,* 13 F.2d 1082,1087 (7th Cir. 1994):

> An imperfect peer review could.... constitute evidence from which a fact-finder could infer lack good faith .... [A] peer review might be so deficient that lack of good faith could be inferred simply from the conduct of the review itself.

In other words, an inference can be drawn that respondents' process is so out-of-line with the demonstrated industry practices and other references that it is a charade dressed to resemble the statutory process but so devoid of fairness that it could only have been done by people who do not have *bona fide* reasons to believe the expulsion action met the statutory requirements for immunity. Misconduct in peer review is evidence of a conspiracy. *Boczar v. Manatee Hosp.*, 993 F.2d 1514, 1519 (11th Cir. 1993). Consider the "unrefrigerated dead fish" test of *Parts and Elect. Motors. Inc. v. Sterling Elect., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

Dr. Smith has shown through this catalog of unfair acts that respondents are abusing their exclusive power over peer review, the faults of which offend every expressed due process guide or standard including customary practices of the industry as exemplified by *Austin.* (*Also see, Rosenblit v. Superior Court, supra* at 131 Cal. App. 3d 1448, 282 Cal. Rptr. 826. The "hospital resisted fair treatment at every crucial step of the proceedings.").

The Court of Appeals overlooked the many defects in the review before the charges were filed when it says, "Dr. Smith's *only* challenge to . . . the investigation is that he was not permitted . . . evidence of conduct of other doctors' (at 1486, Appendix A at 14a, emphasis added).[18] Appendix F at 50a to the top of 53a lists eight defects in the review raised below and not mentioned in the opinion.

The Court of Appeals failed to discuss Dr. Smith's additional complaints of unfair review which include (among other things cited above): suppression of the eye witness' first report on the L.W. death, suppression of Dr. Fletcher's favorable report. (Dr. McCullough had received it before the JRC, in time to re-examine that charge by returning to the Executive Committee. That was not done, instead, as head of the Executive Committee Dr. McCullough advanced that formal charge to be tried at the JRC), respondents kept that evidence from the full Executive Committee and from the JRC. Finally, consider the inexplicable refusal to have a California Medical Association review (requested by Dr. Smith) such as Dr. Austin received or make arrangements for review by a medical school professor such as Dr. Ostergard who investigated St. Agnes Hospital's practices and Dr. Fobbs (*Fobbs, supra*). Also note a similar outside consultant was retained in *Islami* (*supra* at 1365 and 1380).

From the foregoing a jury could easily find respondents did not conduct a fair review and they did not possess a reasonable belief in the appropriateness of the expulsion.

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18. Dr. Smith argues that § 11112(a)'s first test, furtherance of quality health care at the hospital, begins with assessment of all the doctors to see who is the worst. This is what was done in *McKeel v. Moser,* 96 N.C. App. 401, 386 S.E. 2d 60 (1989); *Freedman v. Delaware County Memorial Hospital,* 672 F. Supp. 171 (E.D. Pa 1987); and *Suckel v. Madison General Hospital,* 362 F. Supp. 1196,1200 (1973). It has support in *Robertson v. McGovern,* 83 F.RD. 79; and *Memorial Hospital v. Shudar,* 664 F.2d 1058. In the instant case such data was ordered to be produced, but it never was.

III. THE § 11113 FEE SHIFT WAS INAPPROPRIATE.

A. Fee Shift Based on Sherman Act Issues Which Were Never Set for Hearing

No Sherman Act antitrust issues were ever litigated in a contested motion, but after a post-judgment fee shift motion was fully briefed with no discussion of Sherman Act issues, the district court raised the Sherman Act questions *sua sponte* in support of its order shifting defense fees onto Dr. Smith. (*See* Appendix E at 47a.) The Court of Appeals' opinion perpetuates those issues, "Dr. Smith produced no evidence suggesting a conspiracy or concerted effort to restrain trade" (at 1487 Appendix A page 18a). The opinion includes a graceless explanation for the district court's criticism that Dr. Smith produced no "direct evidence" of a conspiracy (*see* the district court's full text at Appendix E at 47a from the middle of the page down). "Direct evidence" appears twice in that paragraph: "No direct evidence of an agreement *or other manifestation of conspiracy* was provided [by petitioner]" (emphasis added) and "glaring lack of direct evidence . . . suggests [the] charges were incapable of being proved from the start." Compare that with the Court of Appeals' attempt to read the district court's mind (at 1488, Appendix A at 18a) as to what was intended by those words and changing the context:

> The district court . . . was not using the term 'direct evidence' for its technical evidentiary meaning. Rather, the district court used it to explain that Dr. Smith offered nothing but unsupported allegations.

At oral argument the Court of Appeals asked if there was "direct evidence" of a conspiracy in the district court's words, not in the "unsupported allegations" mode which found its way into the opinion. Had the oral argument question been couched in the

terms of the opinion the answer would have been that the facts recited above show that at each level the respondents acted in concert, and when there were joint meetings their subsequent unfair acts provide inference evidence that they conspired. For example, respondent McCullough and Mr. Campbell, the lawyer for the Executive Committee, suppressed Dr. Fletcher's favorable peer review. Mr. Bartel suppressed the eyewitness first report. Together they worked to prevent Dr. Smith from defending the cath lab L.W. death case against a changed burden of proof that now requires the doctor to prove his innocence. (*See* Appendix F at 55a, item f.) That is just one example of concerted action. Additionally, the court would have been directed to E.R. 259 to 261 in which a new heart clinic costing $1.1 million is described with respondent cardiologists and respondent Health Dimensions as owners. "Unsupported allegations" of conspiracy is not an accurate label for the detailed fact scenario outlined above from which one can infer conspiracy and bad faith lack of belief that the action against Dr. Smith was "in furtherance of quality health care" (in the language of § 11112(a)).

B. Defective Assessment of the Attorney Fees

All respondents were represented by the Crosby firm. The fee application requested a third of a million dollars for the work of 18 lawyers and paralegal staffers. It was clear that there was much duplicated effort. For example, 500 hours (over $50,000) were spent examining about 50 linear feet of committee files utilizing several trips by a car full of lawyers who drove for over an hour each way to GSH to find and copy the possible papers which mention Dr. Smith (E.R. 1427 ¶ 9), rather than having a hospital secretary cull the few records which mention Dr. Smith and just that little batch send to the law office. The Magistrate Judge ordered this item to be paid.

Dr. Smith subpoenaed the Crosby law firm's original entry documents which record time spent on the case and objected

under Federal Rule of Evidence 1006 to the "attorney re-cap" (summaries) submitted by the Crosby firm. They were not "time sheets" or other original entries. (*See* Appendix A at 19a.) For examples *see* E.R. 1374, *et seq.* — the recaps submitted to the insurance company. Dr. Smith submitted a detailed letter-brief on that issue demanding original records which he subpoenaed. However, respondents' counsel refused to produce original time sheets and related documents. (*See Copeland v. Marshall,* 641 F.2d 880, 929 (9th Cir. 1980).)

Dr. Smith contested the legal fee award.Although the magistrate judge commented that the case was overstaffed, she recommended that Dr. Smith pay over $300,000 in fees which the district court ordered.

C. The Fee Shift Hearing Violated Due Process.

None of the respondents paid the Crosby firm. Their fees were paid by Truck Insurance Exchange, a Farmers Insurance Company. The magistrate made a one-third of a million dollar shift award through an *in camera* process from which Dr. Smith's lawyer as well as the Crosby lawyers were excluded. That hearing procedure over such a huge sum of money deprives Dr. Smith of due process.

D. The Fee Shift Will Chill Development of Federal Common Law.

The claim to fee shifting depends on Dr. Smith having filed a frivolous case (§ 11113). Since this is the only case in which there is a documented catalog of violations and departures from the custom of this industry, it would chill the law for this unique suit to be called frivolous where no similar suit shows the inutility of this theory that an overwhelming list of irregular acts in the well-defined peer review, hearing, and appeal process both deprives defendants of HCQIA qualified immunity and is evidence of a

conspiracy attempting to monopolize the market for certain expensive health services.

IV. THE RULE 38 SANCTION ON APPEAL IS NOT APPROPRIATE.

A. Good-Faith Contentions Regarding Interpretation of New Statute

The Court of Appeals attacked petitioner's counsel who represented Dr. Ascherman against St. Francis Memorial Hospital, 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1975) which is the subject of a complimentary discussion in *Anton* (*supra*). *Ascherman v. St. Francis Hospital* (*supra*, discussed in 9 Witkin *Summary of California Law* 9th Ed., Corporations § 52) requires an in-the-hospital decision-making process that comports with minimal requisites of fair procedures required by "common law standards" (45 Cal. App. 3d at 515, 119 Cal. Rptr. at 511). For over 20 years Dr. Smith's counsel has been in the front line of the physicians' struggle for due process in hospital hearings. (*See Hillsman v. Sutter Community Hospital,* 143 Cal. App. 3d 743, 200 Cal. Rptr. 605 (1984) which is discussed in 2 Witkin, *Summary of California Law* 9th Ed., Agency and Employment §174.)

The court's criticism (at 1489, Appendix A at 21a) was, "Mr. Berg argued this court should apply various state law decisions and professional guidelines *in place of the text* of the HCQIA." (Emphasis added.) No reference to his briefs supports that statement. That argument was *never* made, and it is not a fair reading of the record. The briefs show that counsel contended for use of common law sources, industry practices, and California Business and Professions Code § 809 *to interpret* HCQIA.

For example:

a. Petitioner's Opening Brief, Page 1:

> Appellant contends that the in-the-hospital review of his work, the subsequent hearing, and the internal appeal process of this private administrative expulsion was neither "fair," "reasonable," nor "adequate" *within the meaning of the HCQIA*. [Emphasis added.]

b. Petitioner's Opening Brief in the Fee Shifting Case, Page 1:

> The above earlier appeal (from a Summary Judgment) concerns common law issues of statutory interpretation of the words "fair," "reasonable" and "adequate" regarding private peer review and in-hospital administrative hearing and appeals over a doctor's hospital practice rights *as used in the new . . . Act of 1986, 42 U.S.C. § 11,111 et seq. (hereinafter "HCQIA")*. [Emphasis added.]

c. Petitioner's Opening Brief in Rule 11 Case, Page 8:

In the Rule 11 appeal at page 8 of the opening brief I wrote that various professional association materials and case examples were:

> submitted to the court to help illuminate the words "fair, " "reasonable" and "adequate" — words *which are used* in 42 U.S.C. § 11101, *et seq*. [Emphasis added.]

d. Petitioner's Opening Brief in Rule 11 Case, Page 13:

Regarding a brief filed in the district court about

California Business and Professions Code § 809 I wrote that brief attempted:

> to explain the origin and meaning of the various provisions that got into § 809 as well as others that are implied in the words "fair," "reasonable" and "adequate" in HCQIA which was compared with § 809.

e. Motion for Joint Argument on Appeal:

March 23, 1994 I filed a motion for joint argument with the *Fobbs* case which had also been set for argument on April 12, 1994 (relying on advisory notes to Rule 34 FRAP). On page 2 in the points and authorities thereof lines 17 to 20 I wrote:

> For this reason, appellant suggests that the argument about *what procedures and practices meet the HCQIA tests* of fairness and adequacy should be opened to the *amici* and both captioned cases should be argued together to allow the court easy access to information available through the *amici* in both cases. [Emphasis added.]

The lack of frivolity of appealing the within matter where no other case has provided guidance can be seen in the comment by Weissburg and Aronson, Inc. (above, Appendix H).

It is fair to argue (as Dr. Smith does) that proof of unethical conduct condemned by a major professional organization gives rise to the inference of conspiracy to engage in wrongful conduct to expel a competitor from an important business venue.

Another indication that this appeal was not frivolous is the

Court of Appeals setting the matter for oral argument (heard April 12, 1994) instead of forbidding argument pursuant to FRAP 34(1) and Circuit Rule 34-4(a).

B. No Notice That Sanction Against Counsel Was Contemplated

The court gave no warning that it was interpreting Dr. Smith's briefs as "[arguing] this court should apply various state law decisions and professional guidelines *in place of the text* of the HCQIA" (emphasis added), and there was no notice or opportunity to protest that such a statement had never been made. Counsel is being punished to pay the opponent's legal fee on appeal without a hearing for acts he did not do. And no neutrals reviewed the sanction. *See* Appendix B and C. The November 17, 1994 order is incorrect because the petition for en banc consideration did not contain the factual record — that was only presented in the Motion for General Order 10.9 Proceedings which only the merits panel read.

That legal fee request seeks $137,500 against Dr. Smith's lawyer. (*See* docket entry for September 8, 1994.)

C. Sanction Not Based Upon Inappropriate Action by Counsel

The good faith appeal and briefing of *Smith* in the Court of Appeals did not falsify evidence, take inconsistent positions, or cite repealed or falsified law, which contemptible conduct attracted a well-deserved Ninth Circuit sanction in *Combs v. Rockwell,* 927 F.2d 486 (1991). *Also see, Int'l. Union v. Taska,* 752 F.2d 1401 (1985); and *Malhoit v. S.Cal. Retail Clerk's Union,* 735 F.2d 1139 (1984). Even in the disgusting false document case of *Malhoit* Judge Boochever dissented because he believed the lawyer was entitle to a hearing. Lack of merit in Dr. Smith's appeal (the standard in *McConnell v. Critchlow,* 661 F.2d 116

(1981) opinion by Judge Boochever) is more in the eye of the beholder than in the meticulously documented record of all the HCQIA's § 11112 practice and procedure violations presented by this appeal. *McConnell* concludes with the Rule 11 (Federal Rules of Civil Procedure) right expressed in the American Bar Association code that allows good faith argument for extension, modification, or reversal of existing law.

D. Federal Rule of Appellate Procedure 38 Should be Applied with Restraint.

Heavy-handed use of Federal Rule of Appellate Procedure 38 has been abjured by some courts to avoid an adverse effect on the appellate system. *See N.L.R.B. v. Lucy Ellen Candy Division*, 517 F.2d 551, 555 (7th Cir. 1975):

> notwithstanding the overburdened condition in which the courts now find themselves we would not desire to take action that could become the basis of chilling the assertion of rights reasonably held in good faith by virtue of imposing a penalty because of a failure to prevail in the litigation.

In the Third Circuit a similar approach has been taken. That court

> has been reluctant to classify appeals as frivolous, so that novel theories will not be chilled and litigants advancing any claim or defense which has colorable support under existing law or reasonable extensions thereof will not be deterred.

Hilmon Co., (V.I.) Inc. v. Hyatt Int'l, 899 F.2d 250, 253 (3rd Cir. 1990). *See also, Leidholt v. L.F.P. Inc.*, 860 F.2d 890, 896 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989) (noting that sanctions may serve to chill zealous advocacy).

CONCLUSION

Certiorari should be granted to define appropriate peer review including in-the-hospital hearing and appeal procedures which earn HCQIA qualified immunity. Conflicts within the Ninth Circuit and between the Ninth and Eleventh Circuits should be resolved. Review should clarify that Federal Rule of Civil Procedure 56 procedure in HCQIA cases should conform to standards previously articulated by this Court. Federal Rule of Evidence 1006 requirements should be clarified. Finally, Federal Rule of Appellate Procedure 38 should be interpreted to provide notice, a right to respond and a neutral review so that lawyers can make reasonable arguments without fear of impoverishing fee shift sanctions for just doing their job.

Respectfully submitted,

JEROME BERG
Attorney for Petitioner

Dated: December 30, 1994

APPENDIX A — *SMITH V. RICKS*, 31 F.3d 1478 (9TH CIR. 1994)

John Phillip SMITH, Plaintiff-Appellant,

v.

William B. RICKS, et al.,
Defendants-Appellees.

John Phillip SMITH, Plaintiff, Jerome Berg, Esq., Appellant,

v.

William B. RICKS, et al.,
Defendants-Appellees.

John Phillip SMITH, Plaintiff-Appellant,

v.

William B. RICKS, et al.,
Defendants-Appellees.

John Phillip SMITH, Plaintiff-Appellant,

v.

William B. RICKS, et al.,
Defendants-Appellees.

Nos. 92-16461, 93-15586, 93-16410 and 93-17300.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 12, 1994.

Decided Aug. 11, 1994.

Appendix A

* * *

Jerome Berg, San Francisco, CA, for the plaintiff-appellant.

Jerome Berg, in pro per.

Paul D. Fogel, Crosby, Heafey, Roach & May, Oakland, CA, for defendants-appellees.

Marilyn Preston, Ann Arbor, MI, for amicus curiae.

Appeals from the United States District Court for the Northern District of California.

Before: FLETCHER, FERGUSON, and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Dr. John Smith, a cardiologist, was removed from the staff of Good Samaritan Hospital. After a lengthy peer review process, the reviewing doctors and the hospital concluded that Dr. Smith's performance was below acceptable standards of care and that removal from the hospital staff was necessary to ensure patient safety. Dr. Smith responded by filing a complaint in federal court alleging that the doctors and the hospital had engaged in an antitrust conspiracy against him and violated his due process rights.

The district court granted summary judgment and awarded attorneys' fees and costs in favor of defendants ("Good Samaritan"). The district court held that Good Samaritan was immune from federal antitrust liability pursuant to the Health

Appendix A

Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101-52, which shields peer review participants from liability if certain review standards are met. The district court also held that Good Samaritan was entitled to reasonable attorneys' fees and cost pursuant to 42 U.S.C. § 11113. Furthermore, the district court imposed $2,000 in Rule 11 sanctions against Dr. Smith's attorney, Jerome Berg. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Dr. John Smith joined the medical staff of Good Samaritan Hospital in 1982. In early 1983, a dispute arose over Dr. Smith's prescription of terbutaline to an elderly patient. Dr. Smith allegedly prescribed an improper dosage of the drug. The patient went into cardiac arrest, and although initially resuscitated, subsequently died. The drug order was later altered to reflect a proper dosage, but Dr. Smith denied altering the order. After reviewing the case, the Quality Review Committee ("QRC") of Good Samaritan's Division of Cardiology recommended that the hospital assign preceptors to monitor Dr. Smith for six months. Under a preceptorship, physicians concurrently review another physician's professional performance.[1]

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1. The Good Samaritan Hospital Medical Staff Bylaws ("Bylaws") provide that every physician who provides medical services at Good Samaritan must be a member of the Medical Staff. Appointment and reappointment to the Medical Staff is granted only in accordance with the Bylaws. Initial appointments to the Medical Staff are made for a period of two years, and reappointment for terms of two years is made by the Board of Trustees in accordance with the Bylaws.

The Medical Staff at Good Samaritan Hospital is organized into twelve departments, including the Department of Medicine, Department of Surgery, (Cont'd)

Appendix A

In 1985, the Division of Cardiology's QRC again

(Cont'd)
Department of Pediatrics, etc. The Department of Medicine is organized into four divisions, one of which is the Division of Cardiology. Dr. Smith worked in the Department of Medicine, Division of Cardiology.

The Bylaws provided that each department must have a Department Executive Committee, which is comprised of the Department Chairman, Vice Chairman, Secretary (officers) and one physician appointed by the Department of Family Practice. Each of the officers of a Department Executive Committee is a member of the active medical staff of that department. Every department or division may also form a Quality Review Committee ("QRC") to review data and medical records. Members of the QRC are either elected by the department/division or appointed by the Chairman of the department/division. The QRC reports to that Department's Executive Committee.

The Bylaws outline the procedure for reappointment. First, the Department Executive Committee reviews its members and makes a recommendation on reappointment to the Credentials Committee. The Credentials Committee is comprised of a designee from each department and two elected staff members at large. The Credentials Committee evaluates recommendations from the departments and advises the Medical Staff Executive Committee regarding reappointment.

The Medical Staff Executive Committee is comprised of the Chief of Staff, the immediate past Chief of Staff, the Chief of Staff-Elect, the Secretary-Treasurer, the Chairman of each department and division having fifteen or more active members, and two elected members of the Medical Staff it also has several nonvoting members. The Medical Staff Executive Committee reviews the recommendations of the Department Executive Committee and the Credential Committee and then makes a recommendation to the Board of Trustees.

If the Medical Staff Executive Committee recommends against reappointment, the physician may appeal to the Judicial Review Committee

(Cont'd)

recommended another preceptorship based on Dr. Smith's improper use of streptokinase, an anti-clotting drug. Dr. Smith appealed to the Medical Staff Executive Committee ("MEC"). On August 20, 1985, the MEC upheld the decision of the QRC to monitor Dr. Smith's use of streptokinase through a preceptorship. Dr. Smith did not appeal that decision.

On January 6, 1986, the California Board of Medical Quality Assurance ("BMQA") informed Good Samaritan Hospital that Dr. Smith's staff privileges at another hospital, O'Connor Hospital, had been revoked.[2] Confronted with the BMQA notice, Dr. Smith responded he had been "automatically terminated" from O'Connor because he was not able to associate himself with an "established group." Dr. Smith claimed O'Connor's criticisms of his care were "unfounded" and "only reviewed by a biased

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(Cont'd)
("JRC"). The Bylaws do not describe how members of the JRC are selected, but the record reflects that the JRC in this case was comprised of seven physicians from different departments.

The Bylaws provide guidance regarding the hearing process before the JRC. The Medical Staff is represented at the hearing by a Medical Staff member who is knowledgeable about the matter; he or she is selected by the Chief of Staff. Both the Medical Staff and the person requesting the hearing are entitled to have legal counsel, as is the JRC itself. The Chairman of the JRC serves as the hearing officer. The JRC's recommendation is referred to the Board of Trustees.

The Board of Trustees acts as the final appeals committee. Its decision is final.

2. Pursuant to California Business & Professions Code §§ 805 & 805.1, whenever a physician's staff privileges are terminated, the professional staff responsible for that termination must file a repon with the Medical Board of California (formerly the Board of Medical Quality Assurance).

committee." In fact, the BMQA asked two independent cardiologists to examine the records of five of Dr. Smith's O'Connor patients. One consultant concluded that "Dr. Smith's treatment constituted evidence of negligence and incompetence," and the other consultant found that "review of these cases in my opinion shows a lack of overall medical judgment and care as would be expected by a specialist in cardiovascular disease."

Good Samaritan requested that Dr. Smith provide medical records of the five O'Connor patients as part of its own 1986 biennial review of staff privileges. Despite repeated requests, Dr. Smith refused to release these records until December 1987. Four members of Good Samaritan's Division of Cardiology, each from a different practice group, then conducted separate and independent reviews. They found that Dr. Smith's use of cardiac catheterization testing was below acceptable standards of care.

On April 14, 1988, Dr. Smith met with the Cardiology Executive Committee ("CEC"). The CEC raised its concerns regarding the O'Connor patients. However, because the Good Samaritan records of Smith's patients were not as bad, the CEC eventually recommended reappointment, subject to intensive, 12-month review and monitoring of Dr. Smith's cases.

Unbeknownst to the CEC, one of Dr. Smith's Good Samaritan patients died during a cardiac catheterization procedure just six days prior to their meeting with Dr. Smith. After reviewing the latest incident, the Division of Cardiology concluded Dr. Smith's actions were illogical, his decision to conduct the catheterization was unjustified, and his technical error in performing the procedure caused the patient's death. On June 21, 1988, the CEC again met with Dr. Smith to discuss the

most recent case. Based on that case and his previous problems, the CEC unanimously recommended against reappointment.

Dr. Smith then met with the MEC to review and discuss the CEC's recommendations. On August 29,1988, Chief of Staff Dr. McCullough wrote to Smith that the MEC had unanimously decided to recommend termination of his staff privileges.[3]

Dr. Smith appealed the MEC's decision. Pursuant to the Medical Staff Bylaws, Dr. Smith received a "Notice of Hearing/ Notice of Charges." The charges against Dr. Smith involved: (1) the five O'Connor cardiac catheterization cases; (2) the Good Samaritan patient who died after a 1988 cardiac catheterization; (3) Dr. Smith's inadequate documentation of patient histories and physicals; (4) his use of streptokinase; and (5) his incorrect dosage of terbutaline in 1983. A Judicial Review Committee ("JRC") was convened and held nine days of hearings from April through August, 1989. Each session was transcribed by a court reporter, resulting in over 1,300 pages of transcripts. Dr. Smith was represented by Dr. Douville, a physician-spokesperson, as provided by the Bylaws. The Medical Staff was represented by two physicians. The JRC panel consisted of seven physicians—a hearing officer-chairman, five panel members, and one alternate. Attorneys for Dr. Smith, the Medical Staff, and the JRC also attended the hearings.

The JRC's counsel questioned each panel member in detail concerning possible bias against Dr. Smith (including patient

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3. The MEC offered to consider Smith's reapplication if he would agree to psychiatric treatment and strict monitoring. Because Dr. Smith and MEC were unable to agree on acceptable conditions for reapplication, the MEC reaffirmed its recommendation that Smith's privileges be terminated.

referrals and financial interest in the outcome); two of the panel members ultimately recused themselves. The chairman of the JRC refused Dr. Smith's counsel's voir dire questions as irrelevant to bias or improper attempts at discovery. Dr. Smith's physician-spokesperson questioned the JRC chairman regarding potential bias.

The Medical Staff presented four witnesses. Dr. Smith's physician-spokesperson cross-examined all the witnesses. Dr. Smith introduced 22 exhibits and had access to all evidence the Medical Staff introduced against him. Dr. Smith testified on his own behalf and called one expert witness.

On October 2, 1989, the JRC found the Medical Staff presented sufficient evidence to support every charge, except for the terbutaline charge. Although the O'Connor cases evidenced Dr. Smith's lack of logic and medical judgment, the JRC gave them less weight because they occurred in 1982-83 and Dr. Smith had subsequently been monitored on numerous cases at Good Samaritan. Thus, the JRC recommended a rigorous, two-year preceptorship instead of termination. Believing the sanction was too lenient, the Medical Staff appealed to the Good Samaritan Board of Trustees.

The Board conducted two hearings in December 1989 and January 1990. Dr. Smith submitted a written statement. Dr. Smith's counsel conducted extensive voir dire of the Board members and at least two members recused themselves. Smith's counsel objected to several other Board members, but the Board concluded those members were not biased or prejudiced. On January 20, 1990, the Board reversed the decision of the JRC. The Board found that the preceptorship was a "woefully uncertain protection for patients." According to the Board, a preceptor

could not "anticipate or react quickly enough to further lapses in Dr. Smith's judgment, thought processes and decision-making in conjunction with his treatment of patients undergoing inherently risky cardiac catheterizations." Therefore, "removal from staff by virtue of nonreappointment would appear to be the only measure which would protect patients from the fundamental inconsistencies which have been reflected in Dr. Smith's performance."

Dr. Smith then filed a complaint in federal court alleging that the termination of his staff privileges was the result of violations of the Sherman Antitrust Act, 15 U.S.C. § 1 and 2, and the Clayton Antitrust Act, 15 U.S.C. § 15. The complaint alleged a conspiracy theory encompassing most of the individuals who participated in the peer review proceedings. According to the complaint, the "conspirators" used the peer-review process to monopolize the market for internal medical services. Acts in furtherance of this conspiracy allegedly included conducting a peer-review process that "violated basic due process provisions" and purchasing Mission Oaks Hospital.[4]

On July 14,1992, the district court granted summary judgment for Good Samaritan based on the immunity granted to hospital peer review participants by the HCQIA. *See Smith v. Ricks*, 798 F.Supp. 605 (N.D.Cal. 1992). The court found Dr. Smith could not rebut the presumption of immunity afforded by

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4. Dr. Smith had also maintained staff privileges at Mission Oaks Hospital. In 1989, Health Dimensions, Inc., the operator of Good Samaritan, acquired Mission Oaks Hospital and merged the two institutions. The medical staff of Mission Oaks was dissolved. Staff members of Mission Oaks who did not have privileges at Good Samaritan Hospital were invited to apply. Dr. Smith did not apply.

the HCQIA. *Id.* at 611-12. Dr. Smith's subsequent motion to "correct" or reconsider the decision was denied.

On October 6, 1992, the district court granted Good Samaritan's motion for reasonable attorneys' fees and costs based on 42 U.S.C. § 11113, but denied Good Samaritan's motion for sanctions. The court found that Dr. Smith's claims were "at best without foundation, and at worst, frivolous." Dr. Smith then filed a motion to "correct" the district court's order awarding attorneys' fees and costs. The district court denied the motion. Two days later, Jerome Berg, Dr. Smith's counsel, "renoticed" the same motion.

On December 4, 1992, the district court heard the "renoticed" motion. The court indicated that it intended to deny the motion and sanction Berg $2,500 for unreasonable and vexatious conduct in litigation. Observing that Berg had shown "more than a tolerable amount of disregard" for normal court procedures, the court stated it could not "continue to ignore" Berg's conduct.

Berg filed a motion for reconsideration of the sanctions. He explained that he had intended to file a notice of appeal, but through a "stupid mistake," his confusing instructions caused his secretary to prepare a renoticed motion. Berg said he signed the renoticed motion "in error without realizing that it was not the notice of appeal I had intended." Berg also claimed he was unable to pay the sanction.

On January 8, 1993, the court ordered Berg to show cause by January 29,1993, why its tentative ruling of December 4, 1992, should not be made permanent. On February 17, 1993, the court filed a written order denying Berg's renoticed motion and

imposing $2,000 in sanctions (instead of $2,500). The court relied on Berg's "pattern of misconduct" including making unreasonable discovery requests, filing unauthorized pleadings, filing an improper motion to reconsider/correct summary judgment, and filing the renoticed motion without reading it.

On April 27, 1993, the magistrate judge filed a report and recommendation regarding reasonable attorneys' fees. After a "painstaking review" of counsel's affidavits and unredacted attorneys' time sheets, the magistrate judge recommended awarding $281,344.78 in fees (six percent less than Good Samaritan requested). On August 4, 1993, the magistrate judge recommended awarding $21,777 in costs (six percent less than originally requested). The district court adopted both recommendations in full.

II

Congress passed the HCQIA because it found the threat of liability under federal law "unreasonably discourages physicians from participating in effective professional peer review" and "[t]here is an overriding national need to provide incentive and protection for physicians engaging" in peer review. 42 U.S.C. § 11101(4)-(5). Good Samaritan is immune from antitrust damages under HCQIA if it demonstrates: (1) its professional review actions complied with the fairness standards set out in 42 U.S.C. § 11112(a); (2) it reported the results of the professional review action to state authorities in compliance with §§ 11131-34; and (3) the professional review actions commenced on or after November 14, 1986, the effective date of the HCQIA *See Austin v. McNamara*, 979 F.2d 728, 733 (9th Cir.1992).[5] Dr.

5. The *Austin* court lists a fourth requirement that defendants "satisf[y] § 11112(b)'s requirement of adequate notice and hearing. 979 F.2d at 733. Section

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Smith does not challenge Good Samaritan's compliance with the reporting requirement, nor does he challenge the applicability of the HCQIA. Therefore, the only issue is whether Good Samaritan was entitled to immunity based on § 11112.

Section § 11112(a) provides that a professional review action must be taken:

> (1) in the reasonable belief that the action was in furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable

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11112(b) lists a series of characteristics and requirements for conducting hearing's and giving notice regarding professional review actions. However § 11112(b) specifically provides: "A professional review body's failure to meet the conditions described in this subsection shall not in itself constitute failure to meet the standards of [adequate notice and hearing procedures as provided in] subsection (a)(3) of this section. In other words § 11112(b) describes a "safe harbor" for immunity but it is not necessary to satisfy §11112(b) to receive immunity. *see also* H.R.Rep. No. 99-903 99th Cong. 2d Sess. 10-11 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6384 6393. Because the plaintiff in Austin did not challenge defendants' compliance wiith the notice and hearing requirements we reject as dicta any suggestion in *Austin* that a hospital satisfy § 11112(b) in order to receive immunity.

> effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

Because the "reasonableness" requirements of § 11112(a) were intended to create an objective standard, rather than a subjective standard, this inquiry may be resolved on summary judgment. *See Austin*, 979 F.2d at 734. The rebuttable presumption "creates a somewhat unusual standard" of review for summary judgment because the "inquiry focuses on whether [plaintiff] has provided sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed that their action was warranted by the facts." *Id.* The district court held that Dr. Smith could not rebut that presumption, and we affirm.

A. As the district court noted, Good Samaritan did not begin its review process until the BMQA notified Good Samaritan that Dr. Smith's staff privileges had been revoked at another hospital due to inadequate care. At all stages of the investigation, the peer review participants found that Dr. Smith's treatment was inadequate. Dr. Smith alleges a vague conspiracy by an "ingroup" of doctors out to get him, but he never challenges the substance of their findings. As the district court concluded, Dr. Smith offers no evidence to rebut the presumption that the reviewers "would reasonably have concluded that their actions would restrict incompetent behavior or would protect patients." *Austin*, 979 F.2d at 734 (internal quotations omitted).

B. Good Samaritan conducted a thorough review over the course of almost two years. Good Samaritan reviewed the O'Connor records as well as the Good Samaritan records. Dr. Smith's only challenge to Good Samaritan's investigation is that he was not permitted to discover or introduce evidence regarding the conduct of other doctors. Dr. Smith essentially claims he was not the worst doctor at Good Samaritan. However, nothing in the statute, legislative history, or case law suggests the competency of other doctors is relevant in evaluating whether Good Samaritan conducted a reasonable investigation into Dr. Smith's conduct. Thus, Dr. Smith cannot rebut the presumption that the termination of his staff privileges was made after a reasonable effort to obtain the facts.

C. Dr. Smith's primary challenge to the district court's grant of summary judgment is that the hearings Good Samaritan conducted were inadequate.[6] Dr. Smith claims Good Samaritan is not entitled to immunity unless all the procedural requirements of § 11112(b)(3)(C) are met. However, as discussed previously, § 11112(b) describes a "safe harbor" provision. The statute expressly provides that hospitals need not meet all of the § 11112(b) requirements. The ultimate inquiry is whether the notice and hearing procedures were adequate. *See Fobbs v. Holy Cross Health Sys. Corp.*, 789 F.Supp. 1054,1068 (E.D.Cal.1992), *aff'd.* 29 F.3d 1439, 1445 (9th Cir.1994). Nevertheless, Good Samaritan's hearing procedures satisfied the "safe harbor" provisions of § 11112(b)(3).[7]

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6. Dr. Smith does not challenge the notice of proposed action and notice of hearing that he received from Good Samaritan. Both notices appear to comply with the requirements of § 11112(b)(1) and (2).

7. Only the hearing procedures of § 11112(b)(3)(C) are at issue. Dr. Smith conceded below that the JRC hearing was held before a panel of physicians who

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Appendix A

During the hearing, the physician must have the right:

> (i) to representation by an attorney or other person of the physician's choice,
>
> (ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges. . . .
>
> (iii) to call, examine, and cross-examine witnesses,
>
> (iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and
>
> (v) to submit a written statement at the close of the hearing.

42 U.S.C. § 11112(b)(3)(C).

The district court found that Good Samaritan's proceedings satisfied those requirements. We agree. Dr. Smith raises a number of "procedural defects," but we reject his claims. First, Dr. Smith asserts he was denied the right of representation because his attorney could not cross-examine witnesses at the hearings. Dr.

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were not in economic competition with him. Thus the requirement of § 11112(b)(3)(A) was satisfied. Also, there is no question that Good Samaritan gave Dr. Smith a written statement describing the basis for its decision upon completion of the hearings, satisfying § 11112(b)(3)(D).

Smith's attorney, however, was present at the hearings, and Dr. Smith's physician-spokesperson did cross-examine the witnesses. Second, Dr. Smith complains about limits placed on voir dire of the JRC. But § 11112(b)(3) does not require voir dire. It only requires that members of the panel hearing the case not be in direct economic competition with the affected physician. Third, Dr. Smith claims that no retired judge presided over the proceedings and "jury instructions" were not given. Once again, nothing in the statute requires such formalities.

Dr. Smith raises numerous other alleged defects. Essentially, he wants peer review proceedings to look like regular trials in a court of law. Whether or not that is a good suggestion, § 11112(b) does not pose such a requirement. Rather, § 11112(b) lists certain procedures, which, if satisfied, guarantee a shield from liability. Good Samaritan's procedures either fit into the § 11112(b)(3) "safe harbor," or are so close to the "safe harbor" that no reasonable jury could find Dr. Smith rebutted the presumption that the procedures were adequate.[8]

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8. Dr. Smith contends that Good Samaritan cannot be immune from liability because its hearings violated state law and fair procedure guidelines of various professional organizations. Whether or not Good Samaritan violated state law or professional guidelines is irrelevant because once the immunity provisions of the HCQIA are met defendants shall not be liable in damages under any law of the United States or of any State based on a professional review action. § 11111a)(l).

Even if relevant it is not clear Good Samaritan violated state law or professional guidelines. For example at the time of the JRC hearing, California law did not give a physician the right to have an attorney in a peer review proceeding, and the courts had approved of the practice of having the affected physician represented by another physician. *See Anton v. San Antonio Community Hosp.*, 19 Cal.3d 802, 140 Cal.Rptr. 442, 456-57 567 P.2d 1162, 1176-77 (1977); *Gill v. Mercy Hosp.*, 199 Cal.App.3d 889, 245 Cal.Rptr. 304, 311-12, *cert. denied*, 488 U.S. 892, 109 S.Ct. 227, 102 L.Ed.2d 217 (1988).

D. Based on the foregoing, we hold that the district court did not err in granting summary judgment in favor of Good Samaritan. Dr. Smith failed to rebut the presumption that, after a reasonable effort to obtain the facts and an adequate hearing, Good Samaritan reasonably believed its action was warranted.

III

If a defendant "substantially prevails" and satisfies the immunity requirements of § 11112(a), the HCQIA provides:

> [T]he court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

42 U.S.C. § 11113. The policy behind this provision is clear: Congress wanted to encourage professional peer review by limiting the threat of unreasonable litigation expenses. *See id.* § 11101.

The district court held that Good Samaritan was entitled to attorneys' fees and costs. The court noted Good Samaritan satisfied the immunity provisions of § 11112(a) and had substantially prevailed. The court then found that Dr. Smith's "antitrust claims were at best without foundation, and at worst frivolous" and that Good Samaritan suffered great expense in defending themselves against "what was an aggressively, and, at

times, inappropriately prosecuted case." The district court further observed that Dr. Smith produced no evidence suggesting a conspiracy or concerted effort to restrain trade. In other words, the district court believed Dr. Smith had no basis for alleging an antitrust violation and produced no evidence supporting his claim.

We review the district court's decision to award attorneys' fees and costs under the HCQIA for abuse of discretion. *Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2d Cir.1992), and we affirm. The district court did not abuse its discretion in characterizing Dr. Smith's claim as without foundation or frivolous. Dr. Smith never produced any evidence suggesting an antitrust violation. At best, Dr. Smith pointed out some procedural defects in the hearing process. Dr. Smith argues the district court improperly awarded fees because of the lack of "direct evidence" of the antitrust violations. Dr. Smith correctly points out that "direct evidence" is not always needed to establish an antitrust violation. The district court, however, was not using the term "direct evidence" for its technical evidentiary meaning. Rather, the district court used it to explain that Dr. Smith offered nothing but unsupported allegations.

Dr. Smith argues his claim was not frivolous because of the absence of case law interpreting what procedures were due under the HCQLA. While few courts have addressed the issue, the statute does describe the "safe harbor" procedures in some detail. Because Good Samaritan met those requirements, it is difficult to argue the statute was ambiguous. Moreover, even if it was a close issue whether Good Samaritan was entitled to immunity under the HCQIA, Dr. Smith still had to prove an antitrust violation. As the district court noted, he simply could not.

Dr. Smith also challenges the amount of the attorneys' fees and cost awards as excessive. However, the magistrate judge carefully reviewed the affidavits and billing entries. The final award of $281,344.78 in fees and $21,777 in costs was six percent less than Good Samaritan requested, and apparently significantly less than the expenses Good Samaritan actually incurred. Nothing suggests the amount of the award was an abuse of discretion.

IV

The district court imposed $2,000 in Rule 11 sanctions against Smith's counsel, Jerome Berg. The district court based its sanctions on Berg's "pattern of misconduct" during the course of the litigation culminating in his filing of a renoticed motion to "correct" the district court's order awarding attorneys' fees. We review orders imposing Rule 11 sanctions for abuse of discretion, *see United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992), and we affirm.

Rule 11 imposes a duty on attorneys to certify by their signature that (1) they have read the pleadings or motions they file and (2) the pleading or motion is "well grounded in fact," has a colorable basis in law, and is not filed for an improper purpose. Fed.R.Civ.P. 11; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 2454, 110 L.Ed.2d 359 (1990). "An attorney who signs the paper without such a substantiated belief shall be penalized by an appropriate sanction . . . [which] may, but need not, include payment of the other parties' expenses." *Cooter*, 496 U.S. at 393, 110 S.Ct at 2404 (internal quotations omitted). According to the Supreme Court, "the central purpose of Rule 11 is to deter baseless filings in district court." *Id.*

To affirm the $2,000 sanction, we need only look to the improperly renoticed motion. Berg claims he meant to file a notice of appeal, but instead renoticed a motion that already had been denied. Berg, thus. admits he did not read the renoticed motion and that it was baseless. Berg pleads it was just a "stupid mistake." But as the district court pointed out, "[C]ounsel can no longer avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head." (quoting *Zuniga v. United Can. Co.*, 812 F.2d 443, 452 (9th Cir.1987)).

As for the amount, Berg claims Good Samaritan incurred no cost in showing up for the December 4 hearing. On its face, the claim is absurd. While the district court did not calculate the exact amount incurred in defending this particular motion, $2,000 is not an unreasonable amount. In light of the entire "pattern of misconduct" and the court's previous restraint in imposing sanctions, it was not an abuse of discretion to award $2,000.

Berg also claims the sanctions were awarded in violation of some vague due process rights. The court gave Berg a full opportunity to explain why sanctions should not be awarded. Although the district court had previously denied Good Samaritan's request for sanctions, it was free to change its mind after Berg continued to engage in his misconduct. There is no "single jeopardy" requirement regarding sanctions.

V

Good Samaritan requests attorneys' fees and costs on appeal pursuant to 42 U.S.C. § 11113. We have awarded appellate fees to the prevailing party under similar statutes. *See, e.g., Gomez v. City of Watsonville,* 863 F.2d 1407, 1419 (9th Cir.1988) (awarding appellate fees under 42 U.S.C. § 1988), *cert. denied,*

489 U.S. 1080, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989). Awarding appellate fees and costs would further the HCQIA's goal of protecting physicians who engage in professional peer review. *See* 42 U.S.C. § 11101(5). We find that Dr. Smith's appeals were frivolous, unreasonable, and without foundation. The law clearly entitled Good Samaritan to immunity, and Dr. Smith could point to no evidence of an antitrust conspiracy. Consequently, Dr. Smith would normally be liable for Good Samaritan's attorneys' fees and costs on appeal pursuant to § 11113.

But if anyone is truly at fault in pursuing this meritless claim, it is Dr. Smith's counsel, Jerome Berg. He should have known his legal arguments were clearly frivolous. Instead of recognizing his misconduct when the district court imposed sanctions, Mr. Berg pressed on. Mr. Berg argued this court should apply various state law decisions and professional guidelines in place of the text of the HCQIA. His appeal of the Rule 11 sanctions is so frivolous that one need only recite his claims to recognize their absurdity. Mr. Berg has wasted this court's time with his baseless appeal and forced Good Samaritan to incur great expense.

Although § 11113 is silent as to who shall pay fees, it is unclear whether we can assess fees against a party's attorney pursuant to the statute. *See Roadway Express, Inc. v. Piper,* 447 U.S. 752, 761 & n. 9, 100 S.Ct. 2455, 2461 & n. 9, 65 L.Ed.2d 488 (1980) (42 U.S.C. § 1988 does not permit recovery from opposing counsel); *Quiroga v. Hasbro, Inc.,* 934 F.2d 497, 504 (3d Cir.1991) (Title VII does not permit recovery from opposing counsel). We do, however, have discretion to award damages, including attorneys' fees, and single or double costs as sanction against bringing a frivolous appeal. Fed.R.App.P. 38; *McConnell v. Critchlow,* 661 F.2d 116, 118 (9th Cir.1981). An appeal is

frivolous if the result is obvious or the arguments of error are wholly without merit. *See McConnell,* 661 F.2d at 118. Because we conclude the appeal was wholly without merit, we choose to exercise our discretion and grant Good Samaritan single costs and attorneys' fees for this appeal pursuant to Fed. R.App.P. 38. Mr. Berg, not Dr. Smith, is ordered to pay this award because Mr. Berg is directly responsible for making frivolous legal arguments, both in his own appeal and Dr. Smith's appeals. *See In re Becraft,* 885 F.2d 547, 548 (9th Cir.1989) (recognizing authority to impose Rule 38 sanctions directly on counsel); *see also Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1201 (7th Cir.1987).

Attorneys for Good Samaritan shall file affidavits and documentation regarding fees earned in this appeal with the clerk of the court within 14 days from the date of entry of this opinion. The amount of the award shall be established by a supplemental order.

AFFIRMED WITH SANCTIONS.

APPENDIX B — NINTH CIRCUIT ORDER (UNPUBLISHED) OF OCTOBER 4, 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16461
D. C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff-Appellant,

v.

WILLIAM B. RICKS, et al.

Defendants-Appellees.

No. 93-15586
D.C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff,

JEROME BERG, Esq.,

Appellant,

v.

WILLIAM B. RICKS, et al.,

Defendants-Appellees.

Appendix B

No. 93-16410
D.C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff-Appellant,

v.

WILLIAM B. RICKS, et al.

Defendants-Appellees.

No. 93-17300
D.C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff-Appellant,

v.

WILLIAM B. RICKS, et al.

Defendants-Appellees.

ORDER

Before: FLETCHER, FERGUSON and TROTT, Circuit Judges.

Jerome Berg, Esq.'s Motion to Recuse the Panel is DENIED.

His motion for proceedings under Ninth Circuit General

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Order 10.9 is also DENIED. General Order 10.9 concerning Sanctions Imposed Against Counsel or a Party states as follows: "No order to show cause need be issued if a party requests the imposition of sanctions in a motion or brief to which the party opposing sanctions has an opportunity to respond." The brief of the appellee in case No. 92-16461 states, ' The Act entitles Good Samaritan to an award of attorneys' fees if Dr. Smith's law suit was frivolous, unreasonable, without foundation, or conducted in bad faith *§ 11113.*" Such a statement is sufficient to make applicable the quoted exception in General Order 10.9, and the panel regards the statement as more than sufficient to put counsel on notice that his lawsuit was being challenged as frivolous.

Moreover, Mr. Berg was aware of the accusations that his lawsuit was frivolous. In his opening and reply briefs, he responded explicitly to such charges and vigorously defended his position. No purpose would have been served by giving him yet another chance to make his case on this issue.

Nevertheless, out of an abundance of caution, the panel has reviewed Mr. Berg's Request for proceedings Pursuant to Ninth Circuit General Order 10.9 (including his personal declaration) filed September 8, 1994 in its entirety and reconsidered *de novo* the issue of whether sanctions are appropriate in this case. Upon such reconsideration, the panel reaffirms its original conclusion. The order of sanctions against Jerome Berg, Esq. shall stand as originally ordered.

The calculation and award of attorneys' fees is ordered transferred to the district court from which this appeal was taken. *See* Circuit Rule 39-1.8.

MOTIONS DENIED. Attorneys' fees transferred to the district court.

APPENDIX C — NINTH CIRCUIT ORDER (UNPUBLISHED) OF NOVEMBER 17, 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-17300

D.C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff-Appellant,

v.

WILLIAM B. RICKS, et al.

Defendants-Appellees.

ORDER

On October 18, 1994, Jerome Berg filed with this court a document entitled Petition for Rehearing of Denial of General Order 10.9 Proceedings and Request for Rehearing En Banc. In response to an earlier Petition for Rehearing and Request for Rehearing En Banc filed by him on September 8, 1994, however, this court had already issued on October 4, 1994 a dispositive order denying (1) his motion to recuse the panel, and (2) his request for proceedings under General Order 10.9; and transferring the issue of attorneys' fees to the district court. In that order, the court advised Mr. Berg that the exception in General Order 10.9 excusing the need for an order to show cause

was applicable to his request, thus rendering his request inappropriate. Moreover, the sanctions issues of which he continues to complain in his October 18, 1994 filing were previously before the full court as a result of his September 8, 1994 request for a rehearing en banc, including his specific claim that General Order 10.9 "was ignored." As Mr. Berg was notified in a final dispositive order filed October 5, 1994, "The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35."

Thus, Mr. Berg's first suggestion for rehearing en banc and his petition for rehearing filed on September 8, 1994 were denied on October 5, 1994.

Accordingly, Mr. Berg's renewed request for recusal and a rehearing en banc is untimely, deemed out of order, and

REJECTED.

APPENDIX D — *SMITH V. RICKS*, 798 F. SUPP. 605 (N.D. CAL. JULY 15, 1992)

John Phillip SMITH, M.D., Plaintiff

v.

William B. RICKS, M.D.,
et al., Defendants.

No. C. 91-20368 JW.

United States District Court,
N.D. California.

July 15, 1992

* * *

Jerome Berg, San Francisco, Cal., for plaintiff.

Chris G. Gasparich, Mary C. Oppedahl, Jennifer A. Shy, Jeffrey L. FAzio, Crosby, Heafey, Roach & May, Oakland, Cal. for defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WARE, District Judge.

Plaintiff John Smith brings this action alleging violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and Section 6 of the Clayton Act, 15 U.S.C. § 17. Plaintiff's claims arise out of an alleged conspiracy and collusive effort by the Defendants to diminish Plaintiff's surgical practice by revoking his staff privileges at Good Samaritan Hospital of the Santa Clara Valley.

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Plaintiff has named numerous defendants in his complaint, including a number of physicians "involved in the operation of the medical staff activities" at Good Samaritan; Good Samaritan Hospital Hospital and Health Dimensions, Inc., which controls Good Samaritan; a majority of the board of trustees of Good Samaritan, which voted to revoke Plaintiff's staff privileges; and two legal advisors of the above described Defendants. Pl.['s] Compl. For Damages. Defendants filed this motion for summary judgment, pursuant to Fed.R.Civ.P. 56. Defendants assert that under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq., they are immune from federal antitrust liability.

I. BACKGROUND

Plaintiff first applied for staff privileges at The Good Samaritan Hospital of the Santa Clara Valley in November, 1981. Plaintiff became an Associate member of the medical staff in February, 1982. In March, 1983, Plaintiff's status was upgraded from Associate to Active.

Pursuant to California regulations, staff privileges must be reviewed biennially. In August, 1984, Plaintiff applied for renewal of his privileges, and in January, 1985, he was reappointed to the Hospital's medical staff. In the reapplication form, Plaintiff stated that he was appealing a decision regarding his status at another hospital, O'Connor Hospital ("O'Connor").

On January 6,1986, the California Board of Medical Quality Assurance ("BMQA") informed Good Samaritan Hospital that Plaintiff's staff privileges at O'Connor Hospital had been revoked. The loss of privileges was based on Plaintiff s medical treatment of five patients at O'Connor Hospital. When Defendant

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Ullrich, then Chairman of the Department of Medicine at Good Samaritan, inquired into the details of the O'Connor decision, Plaintiff stated that the patient care claims were unfounded, were reviewed by a biased committee, and that his termination was based on a "failure to advance." Good Samaritan asked O'Connor to provide medical records for the five O'Connor patient cases which prompted Plaintiff's loss of privileges at O'Connor. Plaintiff objected to release of the documents and to an investigation by the Good Samaritan staff. Ultimately Plaintiff consented to the release of the files, and the files were received by Good Samaritan in late December, 1987.

In September, 1986, Plaintiff was once again required to submit to a biennial review of his staff privileges at Good Samaritan, as required by State regulation. The 1986 reapplication, which occurred during the investigation of Plaintiff's termination from O'Connor Hospital, was ultimately denied by Good Samaritan Hospital.

In early 1988, Defendants Ricks, Murphy, Siegel and Ullrich, who are cardiologists at Good Samaritan, reviewed the O'Connor case files and concluded that Plaintiff's treatment of those patients had been below acceptable standards of care. All five of these cases had involved the cardiac catheterization of patients.

On April 14,1988, Good Samaritan's Cardiology Executive Committee met with Plaintiff and discussed the five O'Connor cases. Unbeknownst to the Committee, six days prior to this meeting, a patient of Plaintiff's died during a cardiac catheterization procedure. On June 9, 1988, the Committee reviewed the case file of this latest patient death, and on June 21, 1988, discussed the matter with Plaintiff. The Committee

ultimately concluded that Plaintiff's privileges should be revoked. Good Samaritan's Department of Medicine Executive Committee concurred.

On July 14, 1988, the Hospital's Medical Staff Executive Committee ("MEC") received the above recommendations. Plaintiff met with the MEC on August 19,1988. The MEC interviewed Plaintiff regarding each incident which preceded the recommendation to revoke his privileges. On August 29,1988, the MEC notified Plaintiff it had adopted the recommendation to revoke Plaintiff's staff privileges. The MEC did indicate, however, that Plaintiff could reapply for staff privileges provided he agree to a number of conditions, including training and consultation requirements, as well as a reduced work load. The MEC and Plaintiff were unable to reach a mutual agreement on acceptable conditions for Plaintiff's reapplication. Accordingly, the MEC put forth a recommendation to revoke Plaintiff's staff privileges "based on [Plaintiff's] inability to interpret, organize and analyze medical information and use it as a basis for making medical judgments." Def.['s] Supplemental Statement of Undisputed Facts RE Def.['s] Mot. for Summ. J.

Thereafter, Plaintiff sought review of the MEC's decision by the Hospital's Judicial Review Committee ("JRC"). Plaintiff received notice of the JRC hearing, which included nine individually held sessions. Each session was transcribed by a court reporter, resulting in over 1,500 pages of transcription. The hearings were held before a hearing officer and a panel of physicians who were not in economic competition with Plaintiff. The sessions were held between April 17, 1989 and August 29, 1989. Plaintiff was represented by counsel at the sessions, and was permitted to call, examine and cross-examine witnesses. A total of six witnesses were called during the course of the hearings.

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Plaintiff introduced 22 exhibits into evidence at the JRC hearing, and was presented with all evidence introduced by the medical staff. Plaintiff claims that he was denied the opportunity to have a comparison survey of Defendant "physician-competitors" medical services rendered at Good Samaritan Pl.['s] Compl. for Damages. Plaintiff argues the survey would have shown that his own work was as good, if not superior to, the work of the doctors reviewing Plaintiff's cases. Plaintiff claims the survey would show that the decision to revoke his privileges was both arbitrary and the product of an effort to eliminate Plaintiff as an economic competitor in the field of cardiac care.

On October 2,1989, the JRC decided that the charges against Plaintiff were supported by facts and evidence. The JRC confirmed that Plaintiff's treatment of the five O'Connor patients was below an acceptable standard of care; that the records of Plaintiff's patients revealed a lack of logic, organization and judgment; and that the patient death in April, 1988 resulted from similar treatment as that exhibited by Plaintiff in the O'Connor cases. However, the JRC decided to reappoint Plaintiff to the medical staff with significant preceptorship requirements. Plaintiff accepted this decision and filed no appeal.

On October 16, 1989, the Medical Staff appealed the JRC decision to the Hospital's Board of Trustees. The Medical Staff argued that the preceptorship was not sufficient to ensure patient welfare. Plaintiff was notified of the Board's hearing and submitted a written statement. Plaintiff, represented by counsel, attended the two hearings held by the Board. The hearings were transcribed. Plaintiffs counsel conducted a voir dire of the Board. The Board accepted the JRC's findings of fact and accepted no new evidence from either party. On January 20, 1990, the Board reversed the decision of the JRC, and ordered the termination of

Plaintiff' s staff privileges. The Board found that preceptorship was not adequate protection of patient welfare, given the nature of the cardiac procedures Plaintiff would be performing, and the history of Plaintiff's medical performance.

Plaintiff's antitrust allegations extend beyond the events at Good Samaritan Hospital described above. Plaintiff had also maintained staff privileges at Mission Oaks Hospital in the Santa Clara Valley. In 1989, Health Dimensions, Inc., the operator of Good Samaritan, acquired Mission Oaks Hospital. and merged the two institutions into a single hospital called Good Samaritan. The medical staffs of the two hospitals were merged, and the staff of Mission Oaks was dissolved. Staff members of the former Mission Oaks Hospital who did not have privileges at Good Samaritan were invited to apply; Plaintiff chose not to do so.

The substance of Plaintiff's complaint can be described as a conspiracy theory encompassing most of the individuals who participated in the various reviews and appeals described at length above. Plaintiff alleges that the defendant cardiologists "covered" for each other by not conducting reviews of each other's work through an audit procedure. Plaintiff further alleges a number of due process violations during the review process, including 1) that a legal advisor used by the committees was a family relative of one of Plaintiff's accusers; 2) that the Hospital by-laws imposed the burden of proof on Plaintiff to show that the decision to expel Plaintiff lacked a basis in fact or was otherwise arbitrary; 3) that Plaintiff was denied the opportunity to present a comparative survey of medical performance by all physicians in the cardiology department, 4) that Plaintiff was not permitted to

present evidence of other cardiologists' cases at Good Samaritan; 5) that Plaintiff's counsel was not permitted to cross-examine adverse witnesses or otherwise actively participate in the hearing process; and 6) that Plaintiff's counsel was not permitted through voir dire to expose bias in review committee members.

It is Plaintiff's contention that the above alleged conduct, as well as the acquisition of the Mission Oaks Hospital, is evidence of a conspiracy to restrain competition in and to monopolize the practice of internal medicine within the relevant market of Santa Clara County.

II. DISCUSSION

1. *Legal Standard*

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. P.Civ.P. 56(c). "[T]he inquiry focuses on whether the nonmoving party has come forward with sufficiently 'specific' facts from which to draw reasonable inferences about other material facts that are necessary elements of the nonmoving party's claim." T.W. *Electrical Service, Inc. v. Pacific Electrical Contractors Ass n.*, 809 F.d 626 (9th Cir.1987).

At the summary judgment stage, the resisting party must proffer more than broadly sweeping allegations in order to establish a genuine issue of material fact. Plaintiff's submissions to this Court suffer from an excess of allegations, and a glaring absence of any detailed explanations.

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It is not sufficient to claim that due process has been violated; a party must state exactly how and when and by whom due process was violated. This burden requires a degree of specificity that Plaintiffs submissions clearly lack. The Court finds no genuine issue as to any material fact in this case, thus making summary judgment proper. The Court finds that the Health Care Quality Improvement Act of 1986 confers immunity on the Defendants as to federal antitrust liability, and accordingly the motion for summary judgment is GRANTED.

2. *Health Care Quality Improvement Act of 1986*

In 1986, Congress passed the Health Care Quality Improvement Act ("the Act"), making the following findings:

> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.
>
> (2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> (3) This nationwide problem can be remedied through effective professional peer review.
>
> (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law,

> unreasonable discouraged physicians from participating in effective peer review.
>
> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. § 11101 (West 1991) (emphasis added).

The Act provides immunity from damages under any federal or state law, provided that the requirements of the Act are satisfied. *Id.* at § 11111. Immunity is available to professional review bodies; to members and staff of these bodies; to persons under contract or other agreement with these bodies; and to persons participating with or assisting these bodies. *Id.* In order for Defendants to receive immunity, this Court must make three findings: (1) that the peer review process conducted by Defendants satisfies the due process requirements articulated in the Act, (2) that the results of the review were reported to State authorities; (3) and that the review actions occurred on, or after November 14, 1986, the effective date of the Act. *Austin v. McNamara,* 731 F.Supp. 934, 939 (C.D.Cal.1990).

a. *Standards for Professional Renew Actions*

Section 11112 of the Act sets out-the standards for review which are required for immunity from antitrust liability. Section 11112(a) requires that the review actions be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,

> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician invoked or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

Id. at § 11112(a) (emphasis added).

i. *The Action Was in Furtherance of Quality Health Care*

In order to prove that the review actions conducted by Defendants were taken in the reasonable belief that they were in furtherance of quality health care, Defendants must show that "with the information available to them at the time of the professional review action, [Defendants] would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." *Austin* at 940.

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The review process which is the subject of this suit was commenced after the BMQA notified Good Samaritan Hospital staff that Plaintiffs staff privileges had been revoked at another hospital due to the inadequate care Plaintiff had provided in five specific cases. The review of these five O'Connor cases commenced in early 1988. The Good Samaritan Board of Trustees' final decision to revoke Plaintiff's staff privileges, culminating months and years of investigations and hearings, was not issued until January 20, 1990.

Although the JRC did not recommend to revoke Plaintiff's privileges, the JRC did find that Plaintiff's treatment of the the O'Connor cases was below acceptable standards of care, and that Plaintiff exhibited deficiencies sufficient to warrant a significantly conditioned reappointment to the medical staff. This Court finds that there is no evidence, beyond the unsubstantiated allegations of Plaintiff, that the review was conducted without the reasonable belief that the action was in furtherance of quality health care.

ii. *The Action Was Conducted After a Reasonable Effort to Obtain the Facts of the Matter*

Defendants must next demonstrate that the review action was taken after a reasonable effort to obtain the facts of the matter. 42 U.S.C. § 11112(a)(2) (West 1991). Defendants obtained the five O'Connor case files and conducted a separate investigation into the quality of Plaintiff's care. Plaintiff alleges that the O'Connor Hospital findings were the result of unfounded claims and a biased review process. Despite his asserted belief that the case files did not reveal deficiencies in the quality of his care, Plaintiff objected strongly to a review of the O'Connor cases by the Good Samaritan staff. Ultimately Plaintiff dropped his objections and the files were reviewed by the Good Samaritan staff.

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In addition to the review of the O'Connor cases, the medical staff and Plaintiff both participated in further investigation into Plaintiff's professional performance at Good Samaritan. This Court finds that the review action conducted by Good Samaritan Hospital was made after a reasonable effort to obtain the facts of the matter. Although Plaintiff attacks the review process because he was not permitted to introduce evidence of the performance of other physicians, the Act's requirements do not suggest that a peer review must focus on the conduct of any physician other than the one being reviewed.

iii. *Adequate Notice and Hearing Procedures Were Afforded to Plaintiff*

Section 11112(a)(3)) of the Act requires that the Defendants provide adequate notice and hearing procedures, or other fair procedures. *Id.* at § 11112(a)(3). The Act, in § 11112(b), specifies procedures to be used by peer review bodies; however, the section concludes by stating, "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." *Id.* at § 11112(b). The legislative history of the Act confirms that the specifications within the Act need not be followed verbatim, and that the ultimate inquiry is if the procedures utilized were "adequate". 1986 U.S. Code Cong. & Admin.News, 6287 at 6393.

There is no indication that Plaintiff did not receive adequate notice of the professional review action and of the hearings conducted; thus, § 11112(b)(1) and (2), which require proper notice of both review actions and any hearings which are to be held, were satisfied.

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Section 11112(b)(3) deals with the conduct of hearings. Plaintiff's JRC hearing was held before a panel of physicians who were not in economic competition with Plaintiff, thereby satisfying § 11112(b)(3)(A). Section 11112(b)(3)(C) specifies a number of rights which must be afforded to the physician under review.

There is evidence that the first four of the five rights were afforded Plaintiff because: 1) Plaintiff was represented by an attorney of his choice; 2) a record of the proceedings was made; 3) Plaintiff called, examined and cross-examined witnesses at the hearing; and 4) Plaintiff presented evidence which had been determined relevant by the hearing officer, regardless of its admissibility in a court of law. The fifth right which must be afforded Plaintiff is the right to submit a written statement at the conclusion of the hearing. There is no evidence that such a statement was submitted, nor is there evidence that Plaintiff was prevented from doing so. Accordingly, this Court finds that Defendants satisfied the requirements of § 11112(b)(3)(C).

Finally, § 11112(b)(3)(D) requires that at the end of the hearing process, Plaintiff has the right to a written recommendation from the panel including the basis for the panels recommendations. The JRC gave Plaintiff a written recommendation, which included its basis for the recommendation. Accordingly, the last requirement is also satisfied.

iv. ***Defendants Had a Reasonable Belief that the Action was Warranted by the Facts Known After a Reasonable Effort to Obtain Facts and After Meeting Due Process Requirements***

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The final requirement for immunity to be conferred on Defendants is that the review action of Plaintiff was "taken in the reasonable belief that the action was warranted by the facts known after such reasonable efforts to obtain facts and after meeting the [due process requirements]." *Id.* at § 11112(a)(4). The Court finds, having already concluded that the review action conducted by Defendants satisfied the standards of § 11112(a)(2) and (3), that based on the facts presented to Defendants and the procedures utilized by Defendants, revoking Plaintiff's staff privileges was warranted. This finding of the Court is premised on the analysis set out above.

v. *Plaintiff Has Not Overcome the Presumption that Defendants Met the Standards of § 11112(a)*

The evidence presented by Defendants demonstrates that Good Samaritan's review action warrants the protection afforded by the Act. Defendants have shown that they satisfied the standards specified in § 11112(a). "A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11112(a) of this title unless the presumption is rebutted by a preponderance of the evidence." *Id.* at § 11112(a).

The Court finds, in reviewing Plaintiff's submissions, that Plaintiff's broadly based allegations of conspiracy and flagrant violations of due process rights are largely unsubstantiated. Plaintiff makes claims as to the current state of the law, the technical competence of other physicians at Good Samaritan Hospital, and broad accusations of the Good Samaritan review proceedings being akin to a "kangaroo court" Pl.['s] Mem. of Law in Opp'n to Mot. for Summ. J. What Plaintiff fails to do, however, is explain in detail how and when any of these

allegations truly occurred and why they are relevant to the question of whether the Defendants' review action warrants immunity. The Court. is not required to conduct discovery for the Plaintiff in order to take the unsubstantiated allegations within Plaintiff's papers and match them up with facts that tend to support these theories and claims.

The Court finds, based upon the undisputed facts in this case, and upon the evidence advanced by Plaintiff, that Plaintiff has not and cannot rebut the Act's presumption of immunity by a preponderance of the evidence.

b. *Defendant's complied with the Act's Reporting Requirements*

"The immunity provided by § 11111(a)(1) can be forfeited if the health care entity fails to report any disciplinary action taken against a physician resulting from a professional review action. § 11111(b). The details of any 'professional renew action that adversely affects the clinical privileges of a physician for a period of longer than 30 days must be reported to the Board of Medical Examiners, §§ 11133(a)(1)(A); 11133(a)(3)(A)(C)." *Austin* at 942. The Act defines "adversely affects" to include the revocation of staff privileges. 42 U.S.C. § 11151.

Defendants have presented copies of the appropriate Form 805, which was sent to the BMQA and which outlined the background and resolution of Plaintiff's case. The Act requires that the report to the agency include the following: the physician's name; a description of the reasons for the action taken; and other appropriate information. *Id.* at § 11133. This Court finds that the contents of the form comport with the requirements of § 11133, and the BMQA is the appropriate agency.

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c. *The Professional Review Action(s) Occurred After the Effective Date of the Act*

The Act became effective on November 14, 1986, and the Court finds that the professional review action(s) which precipitated this lawsuit occurred after that date. The Act requires that a review action occur after November 14,1986 in order to qualify for immunity from liability. The Court's finding is premised on the chronology of events presented above.

III. CONCLUSION

The Defendants have satisfied each requirement of the Act, and accordingly, the Court finds that the professional review action conducted by Defendants warrants immunity from federal antitrust liability. The Court finds in consideration of the Act's broad grant of immunity within § 11111, that immunity should be conferred on all named Defendants in the present action.

Accordingly, because all of the named Defendants are immune from federal antitrust liability by virtue of the Health Care Quality Improvement Act of 1986. Defendants' motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

APPENDIX E—DISTRICT COURT ORDER (UNPUBLISHED) OF OCTOBER 6, 1992

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C 91-20368 JW

JOHN PHILLIP SMITH, M.D.,

Plaintiff,

vs.

WILLIAM B. RICKS, M.D., ET AL.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY FEES AND COSTS, AND DENYING PLAINTIFF'S MOTION FOR SANCTIONS

Defendants move for attorney fees, costs and sanctions following this Court's Order granting summary judgment in Defendants' favor. Pursuant to 42 U.S.C. § 11113, Defendants seek recovery of attorney fees and costs. Defendants also seek sanctions against Plaintiff and Plaintiff's counsel, pursuant to Fed. R. Civ. P. 11. Plaintiff, in his opposition to the instant motion, seeks Rule 11 sanctions against Defendants' counsel. For the reasons set forth below, Plaintiff's motion for sanctions is DENIED, and Defendants' motion for attorney fees and costs is GRANTED.

I. BACKGROUND

The factual background of this case is outlined in the Court's Order granting summary judgment. In essence, this case was

brought by Plaintiff after he lost his medical practicing privileges at The Good Samaritan Hospital of the Santa Clara Valley. Plaintiff sued a number of defendants, including members of the Hospital's Board of Trustees, individual physicians who reviewed Plaintiff's medical work, and the corporation which controls Good Samaritan Hospital. Plaintiff alleged violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and Section 6 of the Clayton Antitrust Act, 15 U.S.C. § 15. The substance of Plaintiff's allegations was that his loss of privileges was the result of a conspiracy and collusive conduct by the Defendants.

This Court granted summary judgment in favor of Defendants, holding that Defendants were immune from antitrust liability, pursuant to the Health Care Quality Improvement Act of 1986, ("the Act"), 42 U.S.C. §§ 11101-11152.

II. DISCUSSION

1. Recovery of Attorney Fees and Costs Under the Act

The Act provides for the payment of attorney fees and costs in appropriate instances. *Id.* at § 11113. The Act states:

> In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the

> claim, was frivolous, unreasonable, without foundation, or in bad faith.

Id. Thus, the Court must determine whether Defendants satisfy the Act's requirements prior to awarding attorney fees and costs.

> [I]n order to recover litigation expenses, defendants must establish (1) that they are among the persons covered by § 11111; (2) that the standards set in § 11112(a) were followed; (3) that they substantially prevailed; and (4) that [Plaintiff's] claims or conduct during the litigation were frivolous, unreasonable, without foundation or in bad faith.

Wei v. Bodner, Civ. No. 89-1137, 1992 WL 165860 (D.N.J. April 8, 1992).

In granting summary judgment, the Court held The Act's immunity provision, specified at § 11111, extended to all named Defendants in this action. The Court also found that Defendants satisfied the Act's standards for professional review actions, as specified at § 11112(a). There is no question Defendants substantially prevailed, having been granted summary judgment in their favor as to the entire case. Thus, the only question remaining is whether Plaintiff's claim or litigation conduct was either frivolous, unreasonable, without foundation or in bad faith.

In order to establish a Section 1 violation under the Sherman Act, a plaintiff must prove the existence of "(1) an agreement or conspiracy, (2) resulting in an unreasonable restraint of trade and

(3) causing 'anti-trust injury.'" *Rickards v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1332 (9th Cir. 1986) (citing *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978)). "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnel Corp.*, 384 U.S. 563 (1966).

Quite candidly, Plaintiff failed to produce any direct evidence of an organized conspiracy or concerted effort to restrain trade, as required by the Sherman Act. Most, if not all, of Plaintiff's evidentiary offerings attempted to show that Defendants failed to meet the minimal due process requirements of the Health Care Quality Improvement Act. While it would have been necessary to prove a failure to meet those requirements, as that is one way to circumvent the Act's immunity against antitrust liability, it appears the substance of Plaintiff's entire case revolved around that one issue. No direct evidence of an agreement or other manifestation of conspiracy was provided. Moreover, nothing beyond the accusations of Plaintiff's counsel addressed the legal question of whether Defendants created a restraint of competition, or an actual monopoly.

Viewing the lawsuit in a light most favorable to Plaintiff, even if Dr. Smith felt confident of his ability to prove that his due process rights were violated by Defendants (and that, consequently, they should not be immune from liability), he still faced a significant challenge to prove the elements of a Sherman Act violation. The glaring lack of direct evidence to support any of the elements for an antitrust violation suggests that Plaintiff's charges were incapable of being proven from the start.

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The public policy behind the enactment of the Health Care Quality Improvement Act of 1986 is to encourage peer review of medical practitioners as a means of bettering the quality of available medical care. It is lawsuits such as this one which Congress perceived as stifling the peer review process, as doctors and hospital personnel feared the possibility of significant antitrust liability stemming from the lawsuits filed by angry practitioners. The immunity provision of the Act is broadly applied to the variety of people who play key roles in the peer review process. And, in Congress' judgment, the minimum requirements which must be satisfied in order to receive the Act's immunity are sufficient.

Plaintiff's antitrust claims were at best without foundation, and at worst frivolous. Nevertheless, Defendants were put to great expense and effort to defend themselves in what was an aggressively, and, at times, inappropriately prosecuted case on Plaintiff's part. If the Act's policy of discouraging these types of law suits is to be actualized, then clearly this is an instance where the recovery of attorney fees and expenses is appropriate. Defendants claim total expenditures of $323,880.02 in defending against this action. The Court orders that all reasonable attorney fees and costs be awarded to Defendants, and refers the matter to the Magistrate Judge to determine the proper recovery amount.

The Court finds that no other sanction beyond the recovery of attorney fees and costs is warranted. The Court denies, as well, Plaintiff's motion for sanctions, as the motion is without sufficient basis in fact or law.

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III. CONCLUSION

For the reasons set forth above, the Court orders that Defendants shall be awarded their reasonable attorney fees and costs associated with defending against Plaintiff's lawsuit. The amount of fees and costs shall be determined by the Magistrate Judge.

IT IS SO ORDERED.

DATE: OCTOBER 6, 1992

s/ James Ware
HONORABLE JAMES WARE
United States District Judge

APPENDIX F — UNFAIR PEER REVIEW ACTS

Dr. Smith's opposition to the summary judgment motion for HCQIA immunity (under § 11112) shows the following facts:

1. The review process was unfair and in violation of customary industry practice* because:

   a. only "in-group" doctors participated in the hospital's ongoing basic peer review of all cases. "Out" doctors like Dr. Smith rarely participated. (E.R. 372)

   b. When Dr. Smith's procedures (such as use of streptokinase) were challenged at the department level (long before charges were filed) he asked for the department's standards for these procedures and outcome profiles of his peers. These requests were refused. (E.R. 369) The only criticism of his streptokinase use is a difference of opinion by competitors as expressed in a "confidential" letter by accuser, defendant Dr. Ulrich which is not supported by medical literature or any outside expert. In this "confidential" letter, Dr. Ulrich wrote:

      > [T]hree of Dr. Smith's cases in which the drug streptokinase was used were felt to be irregular by the Medical Quality Review Committee. . . . The central concern of the committee is that good medical judgment in the use of this drug was not exercised, rather than the fact that a specific protocol or particular method was not utilized. (E.R. 477)

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* Both the district court and the Court of Appeals listed a few of Dr. Smith's fair procedure defects and ignored the most important ones. Where the opinions mention these defects the citation is provided.

Dr. Smith's lucid analysis of one of those cases is found at E.R. 570 to 576 in which he provides references to the medical literature which he relied on for his successful thrombolytic treatment. The patient was up and walking after being bed-bound before the treatment.)

c. The chair of the Staff Executive Committee, Dr. McCullough, suppressed Dr. Fletcher's favorable evaluation which concluded that there was no negligence. The hospital's stamp shows they received this report March 13, 1989. Appellant got it in discovery. It is at E.R. 536 and 537. A copy was not sent to Dr. Smith pursuant to academic peer review custom. Both Dr. McCullough and Ross Campbell, Esq., the Executive Committee's lawyer, kept Dr. Fletcher's report from the full membership of the Executive Committee.

d. Outside evaluation, a standard industry practice, (such as the California Medical Association evaluation provided for Dr. Austin* and a medical school professor provided for Dr. Fobbs*) which Dr. Smith requested in writing (E.R. 370) was also refused.

e. Regarding the death of heart catheterization patient L.W. which is prominent in the August 11, 1994 opinion, an initial incident report by the eyewitness nurse was withheld from the investigators and reviewers at every level including the JRC (E.R 400-2, 428, 511-2), and it is still suppressed despite demands by Dr. Smith for its production in this action. (See Item 2(c) infra)

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* See case citations in the footnote of page 4 hereof.

f. Dr. Marcus was very critical of the extensive complications experienced by defendant doctors which appear in the cath lab log a copy of which Dr. Smith had obtained before he was expelled. These documented malpractices (which went unpunished) prove a double standard favoring the "in group" conspirators whose harm to the public is white washed. (See the testimony of Dr. Marcus at E.R. 411 to 441 and pages from his huge curricula vitae 460 to 468) In this connection, death of a walk-in cath lab patient killed by Dr. Nagel was covered-up because Dr. Nagel prevented a "code" pink sheet from being issued. Dr. Nagel had "cathed" this patient who was in congestive heart failure (CHF) — a contra-indicated act. (See CHF note at E.R. 908, 909) Dr. Marcus went on to question why the entire department's work was not reviewed and disclosed in the interest of quality health care.

g. Although, the Trustees have ultimate responsibility for patient care, it appears that they do not review surveys of medical complications of these physician defendants or otherwise audit to assure the quality of care being rendered. While other departments at Good Samaritan Hospital (for example, infection control E.R. 268 and orthopedics E.R. 269) conduct audits of various procedures to identify problems and to rank the doctors, the Trustees have not required similar surveys of the internists and cardiologists who bring in this high-paying hospital work.

h. As Chief of the Cath Lab, the Coronary Care unit and the Cardiology Diagnostics section, Dr. Nagel can both initiate hostile reviews of his competitors and "white

wash" malpractices committed by his friends. No independent "out group" cardiologist can initiate a review to which Dr. Nagel objects.

2. Once charges were initiated by the Medical Executive Committee assisted by Ross Campbell, Esq. the matter came to trial beginning April 17, 1989 before a committee of doctors (Judicial Review Committee ("JRC")) picked by the defendants and "advised" by Keith Bartel, Esq. the cousin of one accuser (Dr. Nagel)* Mr. Bartel deliberated with the JRC and wrote their opinion. That hearing was defective because:

   a. *Voir dire* of the JRC regarding personal and business ties to the accusers was forbidden by Mr. Bartel (798 F. Supp. 608, Claim No. 6) in violation of California decisional law. The 31 Fed. 3d 1486 discussion of the permitted *voir dire* is misleading. Mr. Bartel did not allow the JRC to answer the written list of questions Dr. Smith submitted about whether JRC panelists or members of their families were patients of the accusers or if they had other business or professional connections. In the middle of the JRC we discovered a JRC member was a patient of Dr. Ricks. See my protest letter at E.R 481. Obviously, the limited *voir dire* allowed by Mr. Bartel did not reach this type of connection. (Noted at 798 Fed. Supp. at 608 Item No. 6 and Ruled on at 31 Fed. 3d at 1486, HCQIA: "does not require *voir dire.*")

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* Mr. Bartel was engaged for this function by defendant hospital organization in contrast to the customary practice of having a retired judge advise the JRC (noted at 31 Fed. 3d at 1487). Compare *Fobbs v Holy Cross* 789 F. Supp. 1054 (E.D. Cal. 1992) and *Austin v McNamara* 979 F.2d 728 (9th Cir. 1992)). At my last previous JRC with this hospital we had a retired judge officiate. (See E.R 410.)

b. No record (required to gain the irrebuttable presumption of an adequate hearing procedure delineated in § 11112(b)(5)(C)(ii)) was made of the "Jury" instructions Mr. Bartel gave to the JRC with whom he deliberated. (See AOB page 19.) In this connection the appeal opinion at 31 Fed. 3d at 1487 is confusing because it suggests there were no instructions by Mr. Bartel.

c. The eyewitness nurse's first report was suppressed (see l(e) *supra*). Existence of this report came to Dr. Smith's attention when the nurse testified at the JRC. Mr. Bartel ruled that Dr. Smith was not entitled to present this exculpating evidence to the JRC. Dr. Smith was given a second report made a week or so later after Mr. Bartel's cousin, Dr. Nagel, consulted with this nurse. (E.R. 170 to 173 is the JRC transcript of this nurse's testimony on this point and Mr. Bartel's ruling, which demonstrates he was in charge of the JRC in the manner of a trial judge).

d. Dr. Fletcher's academic "peer review" evaluation was suppressed. (See E.R. 434 which is that letter, and note that a copy was sent to attorney Campbell who attended all sessions of the JRC.)

e. Dr. Smith's lawyer could only participate at the JRC as a "potted plant" (Noted at 798 Fed. Supp. at 608 Item No. 5 and at 31 Fed. 3d at 1486), contrary to California Business and Professions Code § 809 which was enacted after the JRC and before the appeal to the hospital's trustees.

f. The burden of proof was upside down — on Dr. Smith, contrary to the prior practice at Good Samaritan Hospital which put the burden on the accuser. (See 798 F. Supp. 608, Claim No. 2) That unfair burden of proof is contrary to subsequently enacted California Business and Professions Code § 809. When I represented a doctor at such a hearing at GSH in prior years the burden was on the accuser (E.R. 410).

g. The hospital refused to produce Dr. Smith's 1800 charts which document his good reporting and treatment skills (E.R. 42, 295 and AOB page 23). This was exculpatory evidence to defend the charge of poor charting in a few cases.

h. Dr. Smith's request for departmental standards and outcome profiles of all doctors in his field was denied. (See 798 F. Supp. 608, Claim Nos. 3 and 4.)

i. A group of old cases from O'Connor Hospital (another anti-competitive hospital) was the basis for one of the charges despite California law that discourages resort to such outdated events. The decision acknowledges that similar grievances were not found in Dr. Smith's practice at Good Samaritan Hospital.*

3. At the appeal hearing before the hospital's Board of Trustees:

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* The opinion incorrectly describes these as heart catheterization cases which they are not, but the error was made in the district court. Nevertheless, see E.R. 904 which does not describe the O'Connor cases as cath cases. They are complex internal medicine cases where reasonable physicians might suggest a variety of treatments.

Appendix F

a. Ten out of fifteen of the trustees who decided the case were tied to the accusers as patients themselves, family members of patients, or in business relations (which connections were documented in a *voir dire* examination). They refused to step aside. (E.R. 538, see transcript of trustees meeting at E.R. 931)

b. Mr. Simmonds, the legal advisor to the trustees, made no record of his "jury" instructions to the trustees with whom he deliberated and whose opinion he wrote. (E.R. 355, see also AOB page 19.)

c. The JRC decision to keep Dr. Smith on staff was disregarded by the trustees in derogation of the then-effective California Statute on this specific issue. (California Business and Professions Code § 809.05)

APPENDIX G — SIGNIFICANT SECTIONS OF THE HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986, 42 U.S.C. § 11111 *ET SEQ.*

CHAPTER 117—ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

* * *

§11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken—

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

Appendix G

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating—

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B)—

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right—

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon

payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses.

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right—

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

§ 11113. Payment of reasonable attorneys' fees and costs in defense of suit

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a)

of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

§11114. Guidelines of the Secretary

The Secretary may establish, after notice and opportunity for comment, such voluntary guidelines as may assist the professional review bodies in meeting the standards described in section 11112(a) of this title.

APPENDIX H —NEWSLETTER, WEISSBURG AND ARONSON

(Omitted Here But Submitted Separately As Lodging Appendix)